No. 90-6531-CFX
Status: GRANTED

Title: Keith J. Hudson, Petitioner
v.
Jack McMillian, et al.

Docketed:
November 19, 1990

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Hudson,Keith J., Bronstein,Alvin J.

Counsel for respondent: Guste Jr.,William J.

Entry	Date	Note	Proceedings and Orders
1	Nov 19 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jan 24 1991		DISTRIBUTED. February 15, 1991
4	Feb 12 1991	P	Response requested -- JPS. (Due March 14, 1991)
5	Mar 12 1991		Brief of respondents McMillian, et al. in opposition filed.
6	Mar 14 1991		REDISTRIBUTED. March 29, 1991
8	Apr 8 1991		REDISTRIBUTED. April 12, 1991
10	Apr 15 1991		Petition GRANTED.
			**********
11	Apr 17 1991	G	Motion of petitioner for appointment of counsel filed.
12	Apr 26 1991		Record filed.
		*	one vol., USDC MD LA
13	Apr 29 1991		Motion for appointment of counsel GRANTED and it is ordered that Alvin J. Bronstein, Esquire, of Washington, D. C., is appointed to serve as counsel for the petitioner in this case. The order entered April 15, 1991, is amended to read as follows: The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to the following question: "Did the Fifth Circuit apply the correct legal test when determining that petitioner's claim that his Eighth Amendment rights under the Cruel and Unusual Punishment Clause were not violated as a result of a single incident of force by the respondents which did not cause a significant injury?"
14	May 7 1991		Record filed.
		*	USCA 5-one vol.
15	Jun 4 1991		Joint appendix filed.
17	Jun 18 1991		Order extending time to file brief of petitioner on the merits until July 10, 1991.
18	Jun 18 1991		Brief amicus curiae of Americans for Effective Law Enforcement, Inc. filed.
23	Jul 9 1991		Brief amicus curiae of Prisoners' Legal Services of New York filed.
19	Jul 10 1991		Brief amicus curiae of United States filed.
20	Jul 10 1991		Brief amicus curiae of Human Rights Watch filed.
21	Jul 10 1991		Brief amicus curiae of Prisoners' Legal Services Project filed.
24	Jul 10 1991		Brief of petitioner Keith Hudson filed.
22	Jul 11 1991		Record filed.
25	Jul 26 1991	G	Motion of the Solicitor General for leave to participate

No. 90-6531-CFX

Entry	Date	Note	Proceedings and Orders
			in oral argument as amicus curiae and for divided argument filed.
26	Aug 12 1991		Brief of respondents McMillian, et al. filed.
27	Aug 12 1991		Brief amici curiae of Texas, et al. filed.
28	Aug 21 1991		CIRCULATED.
29	Sep 5 1991		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 13, 1991.(2ND CASE)
30	Sep 20 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
31	Sep 26 1991	X	Reply brief of petitioner Keith Judson filed.
32	Nov 13 1991		ARGUED.

ORIGINAL

90-6531

KEITH J. HUDSON

PETITIONER

-V-

JACK MCMILLIAN, CSO III, ET AL

RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner....., ask leave to file the attached petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in both the U.S. District Court and U.S. Court of Appeals. Petitioner's affidavit in support of his motion is attached hereto.

Supreme Court, U.S.
FILED
NOV 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

S/ Keith J. Hudson

PETITIONER--PRO SE

30 pp

KEITH HUDSON

PETITIONER

-V-

JACK MCMILLIAN CSO III, ET AL

RESPONDENT

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Keith J. Hudson being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1.) Are you presently employed? (No) last employment: 3/11/90; $2.20.

2.) Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources? (No).

3.) Do you own any cash or checking or savings account? (No).

4.) Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property? (No).

5.) List the persons who are dependent upon you for support and state your relationship to those person. (None).

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

S/ Keith J. Hudson

Subscribed and sworn to before me this 15th day of November, 1990

S/ Randolph G. Petska
NOTARY

ORIGINAL

90-6531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

KEITH J. HUDSON
PETITIONER

-V-

JACK MCMILLIAN, CSO III, ET AL
NO.# 87-3394
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
FOR THE FIFTH CIRCUIT

RECEIVED
NOV 19 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MR. KEITH J. HUDSON #91888
CAMP J SHARK UNIT #4-L-11
LOUISIANA STATE PENITENTIARY
ANGOLA, LA.70712

PETITIONER---PRO SE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

NO.# 87-3394

KEITH J. HUDSON,
PETITIONER

-V-

JACK MCMILLIAN CSO III, ET AL,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Keith J. Hudson, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 31,1990.

OPINION BELOW

The Court of Appeals entered its Memorandum decision affirming its reversal of Petitioner Civil Action matter on July 31,1990. A copy of the memorandum is attached as Appendix A.

The Court denied Petitioner's petition for rehearing and suggestion for rehearing en banc on September 4,1990. A copy of the order is attached as Appendix B.

TABLE OF AUTHORITIES

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QUESTION PRESENTED FOR REVIEW

1. Whether District Court erred in just compensating the Petitioner in one aspect of the complaint (Eight Amendment) whereas Petitioner proved at trial that defendant violated not only constitutional, but their own institutional policy. (See Tr. testimony of Capt. Cole).

2. Whether Circuit Court considered the status (Pro Se) of the Petitioner, in that it was his "first-ever" lawsuit filed, but yet, put enough effort in it, to expose the unconstitutionality of the defendants in their official capacity. And whether this inconsideration denied Petitioner his guaranteed "Due Process".

3. Whether Circuit Court decision to disturb the District Court's decision, on the grounds of a recently ruled on case, which criteria, makes it all but impossible to petition and win a case of brutality, and whether this 1990 ruling should apply retroactively to the Petitioner, because his case was in 1983.

4. Whether the Circuit Court misread the Magistrate's wording in his judgment.

JURISDICTION

On July 31,1990 the Court of Appeals entered judgment affirming its reversal of Petitioner Civil Action matter. (App. A), The jurisdiction of this Court is invoked (sic) under Title (sic) 28, United States Code, Section 1254 (1). 1/

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENTS V , XIV , VIII , I

> No person shall be deprived of life, liberty or property without due process of law..... without just compensation.
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech.....
>
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel & unusual punishment inflicted.
>
> .....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

1/ No other petitioner is involved in this petition

This case involves Amendments VIII, I, V, XIV, to the Constitution of the United States, made applicable to the states by Sections of all the above, and enforced by Title 42, Section 1983, United States Code:

> "Every person who, under color of any statute, ordinate, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner filed a Civil Action suit, and won the matter in United States District for the Middle District of Louisiana. Keith J. Hudson -v- Jack McMillian CSO III, et al, CA-83-1385-A M.D. La.1987. On July 31,1990, an panel of the Fifth Circuit Court of Appeals reversed the judgment. (See App.A) A timely petition for rehearing pursuant to Rules 39, 40 and 41 of the FRAP and local Rules 39 and 41 (See App.B (1) filed on August 13,1990, and the petition was denied September 4,1990 by the Fifth Circuit.

REASON FOR GRANTING THE WRIT

Courts are agreed that the excessive or unnecessary use of force violates the Constitution, but they have not agreed on what provision it violates. Some have relied on the Eighth Amendment, United States -v- Georvassilis, 498 F.2d 883, 885 (6th Cir.1974); see also Ingraham -v- Wright, 430 U.S. 651, 669, 97 S.Ct. 1401 (1977) (dictum), quoting 525 F.2d 909, 915 (5th Cir. 1976) others have held that the ordinary prison guard assault is not cruel and unusual punishment but instead is a due process violation, George -v- Evans, 633 F.2d 413 (5th Cir.1980), previous opinion at 620 F.2d 495 (5th Cir.1980); Johnson -v- Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973); Lamb -v- Hutto, 467 F. Supp. 562 (E.D.Va.1979) other have avoided the question United States -v- Santos, 588 F.2d 1300 (9th Cir.1979) on cited both Eighth Amendment and the Due Process Clause Freeman -v- Franzen, 695 F.2d 485 (7th Cir.1982); King -v- Blankenship, 636 F.2d 70 (4th Cir.1980)

In Johnson -v- Glick, supra note 285; the Court stated a legal standard for prison brutality claims:

> "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. Id. 481 F.2d at 1033.

In the case at bar, Petitioner avers that he was beaten while in "full restrains". He wasn't struggling arguing with defendant McMillian up until the first punch thrown, as the reversal decision would have this Court believe in its ruling. (See App. A: pg. 2-ppgh 2)

Although Johnson was a due process case, this standard has been widely adopted under the Eighth Amendment as well as the Due Process Clause. See e.g. Putman -v- Gerloff, 639 F.2d 415 (8th Cir. 1981); King -v- Blankenship, supra; Funtado -v- Bishop, 604 F.2d 80, 95 (1st Cir.1979); Henderson -v- Counts, 544 F.Supp. 149 (E.D. Va.1982) other standards that courts have used, such as reasonable force under the circumstances Ridley -v- Leavitt, 631 F.2d 358, 360 (4th Cir.1980) or "conduct that shocks the conscience" Black -v- Stephens, 662 F.2d 181, 188 (3rd Cir.1981) amount more or less to the same thing. Johnson, supra note 285, 481 F.2d at 1033, quoting Rochin -v- California, 342 U.S. 165, 172 S.Ct. 205 (1952)

While prison officials should be afforded broad discretion in maintaining order and discipline within the prison walls, we do not think that any amount of force is justified, especially if the threat of disorder or disobedience has subsided. Ridley -v- Leavitt, supra.

In this case, the Petitioner proved the constitutional violation, and as the Circuit Court claims, the Petitioner failed or founders on the significant injury prong. Huguet -v- Barnett, 900 F.2d 838 (5th Cir.1990) But this ruling in itself falls short, because of its negligence in also considering the "mental" injury sustained, which is more significant than physical damage. Whereas the injury need not be crippling or life-threatening, Shillingford -v- Holmes, 634 F.2d 263 (5th Cir.1981) and one count has found that brandishing a loaded pistol at point-blank range was sufficient to "shock the conscience". Black -v- Stephens, supra.

The Circuit Court mustive neglecting to read the entire judgment transcript, because the Magistrate awarded the Petitioner "actual damages", and would have award the Petitioner "punitive damages", but it wasn't stipulated in the Petitioner's "relief desired", due to Petitioner's lack of knowledge of process & constructing a Civil Action complaint at that time. (See Judgment transcript)

So the "modest judgment" that the Circuit Court worded in their ruling is a misquoting and miscontrued violation of his Due Process right.

The Petitioner made more than an Eighth Amendment claim in his complaint, but the Circuit Court reversed the judgment on that alone. Whereas a "Liability" claim was asserted and never challenged, or ruled on.

If prison officials know of violations of your rights, are in a position to correct them, and fail to do so, they may be liable. Bruner -v- Dunaway, 684 F.2d 422 (6th Cir.1982); Harris -v- Chanclor, 537 F.2d 203, 206 (5th Cir.1976); Curtis -v- Everette, 489 F.2d 518 (3rd Cir.1973) cert. denied, 416 U.S. 995 (1974); Byrd -v- Bristike, 466 F.2d 6, 11 (7th Cir.1972);

The Petitioner, lastly contends that trial court erred in not considering the complaint as a whole, because it contain First & Fifth Amendment rights violations as well as Fourteenth, but put too much emphasis and attention to the Eighth, whereas testimony demostrated a clearly violation of all the stipulated constitutional rights.

CONCLUSION

For the foregoing reasons, Petitioner Keith J. Hudson respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted:

S/ Keith J. Hudson

Keith J. Hudson #91886
Camp J Shark Unit #4-L-11
Louisiana State Penitentiary
Angola, La.70712

Dated: November 15, 1990

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

U. S. DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
FILED APR 30 1987
C. LEE DUPUIS
CLERK

KEITH J. HUDSON

VERSUS

JACK McMILLIAN, CSO III,
ET AL

CIVIL ACTION

NUMBER 83-1385-A

OPINION

This matter is before the court following a trial on the merits on March 10, 1987.

Plaintiff, an inmate at Louisiana State Penitentiary, Angola, Louisiana, brought this action pursuant to 42 U.S.C. §1983 against corrections officers Jack McMillian, Marvin Woods and Arthur Mezo.

The plaintiff had consented to disposition of this case by a magistrate pursuant to 28 U.S.C. §636(c) on November 26, 1986 and the defendants consented on December 9, 1986. An order of reference was entered on December 11, 1986. When the case was called for trial, the plaintiff moved for a continuance, which was denied. The parties were then requested to confirm on the record that they had consented to trial before the magistrate. Archie v. Christian, 808 F.2d 1132 (5th Cir. 1987). The defendants affirmed their consent, but the plaintiff stated he wished to revoke his consent. Plaintiff stated no reason for wishing to do so.

NOTICE MAILED TO:
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Hudson
Penn
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INDEX
ORDER
HEARING
DOCUMENT NO. 37

While consent must be voluntarily given, there is no corresponding right to revoke it if later developments in the case, now before the magistrate, indicate to a party that tactically he would be better off before a district judge. Although one district judge or magistrate may be more or less lenient with a pro se litigant in terms of how a case is tried or may evaluate a pro se plaintiff and his witnesses more or less favorably than another judge or magistrate, these considerations are not sufficient to permit a party who has voluntarily consented to a bench trial before the magistrate to withdraw that consent immediately before the trial begins. See, Southern Agriculture Co. v. Dittmer, 568 F.Supp. 645 (D. Ark. 1983).

Nor does the fact that in this particular case the magistrate could have converted the trial to an evidentiary hearing under section 636(b)(1)(B) and the district court's original reference of this case to the magistrate on June 4, 1984 justify allowing the plaintiff to revoke his consent. For his own reasons, the plaintiff consented. He did not indicate that his consent was coerced or given under any threats. See, Adams v. Heckler, 794 F.2d 303 (7th Cir. 1986). His attempt to revoke it following immediately on the heels of a denied motion for a continuance was an obvious attempt to delay the trial at the last moment. Therefore, the plaintiff's revocation of his consent will not be accepted.

This case involves an alleged beating of the plaintiff by defendants McMillian and Woods. Plaintiff also claims that Mezo, a lieutenant, stood by while the other two defendants beat the plaintiff. Plaintiff further claims that the defendants denied his repeated requests for medical attention.

Edward Allen testified that on October 30, 1983 in the early morning hours he was housed on the same tier as the plaintiff at Camp J in an adjacent cell. An argument occurred between him and the plaintiff, but no real disturbance took place. Plaintiff had been washing his clothes in his cell. Woods came down the tier and "had words" with the plaintiff. McMillian also approached the plaintiff's cell and told the plaintiff to shut up. Allen said Woods had what he characterized as a nasty attitude toward inmates.

While Allen said he could hear what was going on, he could not see it clearly because of the way the cells are constructed. He saw the plaintiff being removed from his cell. Then, he testified, he heard the plaintiff hollering and what sounded like "licks" - blows - being "passed." Later Allen was removed from his cell and also beaten by Woods and McMillian.

Later, the plaintiff told Allen he had been beaten and his mouth had been injured. Plaintiff showed Allen his face, mouth and broken front brace. Allen specifically recalled a bruise on the plaintiff's lip. Allen testified that when the plaintiff

left his cell he was handcuffed and shackled, offered no resistance and was not visibly bruised or swollen.

On cross examination, Allen confirmed that he recognized the voices of McMillian and the plaintiff as he, Allen, had been on that tier for a few months and the plaintiff was there when he arrived. Also, Woods and McMillian had been working there also before his arrival.

Allen testified that McMillian kept speaking to the plaintiff in a provocative manner.

Allen said he was aware that the plaintiff had written to Major Dave Kelone to complain about the incident and asked for an investigation (Exhibit D-1), but did not recall actually seeing the letter nor whether Kelone spoke to him, Allen, during the investigation.

Inmate Earl Truvia also testified that on October 30, 1983 he was housed at Camp J, Cuda 3-4 Unit. He heard a commotion early that morning at about 1:45 a.m. which sounded like punches and scuffling and he heard screams.

On November 1, 1983 he saw the plaintiff in the yard. Plaintiff had bruises on his lip and over one eye, and a swollen cheek. He saw no blood or cuts. Plaintiff told Truvia he was involved in an incident with the security guards.

Truvia admitted that he did not see any scuffle and that the time could have been as late as 3:00 or 4:00 a.m., but he thought it was between 1:45 and 2:30 a.m. Truvia could not tell from the

sounds he heard whether it was the plaintiff involved in the scuffle, and he heard only one incident.

Hudson testified that he had an argument - "passed words," as he calls it - and McMillian said he would be back with something for the plaintiff. McMillian came back shortly and the two had more words. McMillian told the plaintiff to pack his belongings because he was going to the dungeon (administrative lockdown). Woods arrived to assist McMillian. After leaving his cell in restraints, Woods and McMillian walked with the plaintiff to administrative lockdown. On the way, plaintiff testified, McMillian commented to Woods about knocking the plaintiff's teeth out and then McMillian punched the plaintiff in the eye, chest and mouth, while Woods held the plaintiff by the back of the plaintiff's jumpsuit and kicked and punched the plaintiff in the back. Plaintiff testified that Mezo came out and told them "not to have too much fun."

Plaintiff testified that he asked Captain James Cole also to put him on the sick call list. Plaintiff emphatically testified that he did tell the sick call man he had been beaten. Plaintiff stated he had no problems with his partial plate prior to this incident. The plate was not usable until it was repaired in February 1984, plaintiff testified. In the meantime, he could eat satisfactorily, although it felt strange.

Plaintiff testified that when he went to his disciplinary

board hearing he asked to be sent to the hospital, but the board refused to discuss his request.

Defendants called Officer James Cole. He testified that normally the shift supervisor or an escort officer escorts an inmate to lockdown. An officer who abuses an inmate is subject to disciplinary action, and probably discharge, in an incident such as the one described by the plaintiff. He added that if an incident of the use of force is reported it is investigated to either confirm or refute the allegations. This procedure is for the protection of the officer if the charges are unfounded. Cole did not recall seeing the plaintiff on October 31, 1983 nor did he recall any incident of brutality at Camp J.

Gary Dubroc testified that he was a sick call man at Camp J in 1983. He said he saw the plaintiff on October 31 or November 1, 1983 but the plaintiff did not ask to be sent to the hospital. He added that if the plaintiff had told him that security officers had beaten the plaintiff, he would have sent him to the hospital. Dubroc admitted on rebuttal that the sick call sheet dated November 1, 1983 (Exhibit D-5) was not signed by him.

Marvin Woods denied that he used any force whatsoever against the plaintiff. The plaintiff was taken to lockdown by Lt. Mezo and himself, while McMillian remained behind. Woods testified that the plaintiff and Allen were arguing about the noise the plaintiff was making hand washing some clothes in his cell. Woods handcuffed the plaintiff and Mezo went with Woods

and the plaintiff to lockdown where Mezo removed the handcuffs. Woods testified this would be in accordance with prison procedure requiring the shift supervisor to escort an inmate to lockdown since Mezo was the shift supervisor at the time.

Woods could recall no instance of brutality at Camp J. In his opinion, an inmate, even in full restraint, is always a threat. Woods testified he was not familiar with the provisions of the Eighth Amendment to the United States Constitution. However, he stated he would not inflict harm on an inmate except in the line of duty, but in doing his duty would do whatever was necessary, without limitation, to maintain security.

David Lemoine, a medical specialist, testified that he saw the plaintiff on November 1, 1983 at sick call. Plaintiff had some dental complaint at that time. Had the plaintiff complained of a beating causing loose teeth it would have been noted on the sick call sheet. However, the plaintiff appeared to be in no acute distress (NAD) as is noted on the sick call sheet. Exhibit D-5. Lemoine explained under cross examination that NAD means the observed condition is not life threatening and no immediate attention is required. Lemoine noted on the sick call sheet that the plaintiff had been scheduled for dental call out since July 1983. Lemoine did not notice any swelling or bruises, and if he had, he would have noted it on his sick call sheet, he testified.

While there is conflicting testimony about almost all aspects of this case, the testimony about the use of force is the

most divergent. According to the plaintiff, Woods and McMillian, with Mezo's express approval, beat the plaintiff totally without justification or need. This is supported by the testimony of Allen. The plaintiff's injuries were corroborated by Truvia. Needless to say, all of these are convicted felons.

The defendant who testified, Woods, denied that any force whatsoever was used against the plaintiff. The medical records do not show that the plaintiff was sent to the hospital on October 30, 1983. The first medical record entry is November 1, 1983 which notes a problem with the plaintiff's teeth of an unspecified nature. Other defense witnesses denied the plaintiff sought medical attention from them. The plaintiff testified that he repeatedly sought medical attention but was refused. He argued that by refusing his requests, the plaintiff would not be able to produce contemporaneous medical records to document his injuries. Defendants introduced reports by Mezo and McMillian for the limited purpose of showing that they reported an incident, but the court refused to admit the reports for the truth of their contents since neither defendant testified, and counsel for these defendants did not urge any hearsay exception in support of their admissibility.

Plaintiff did write a letter of complaint to the camp major, Dave Kelone (Exhibit D-1) the same day of the incident, which was received on November 2, 1983, complaining of the beating meted out by Woods and McMillian.

FINDINGS OF FACT

Based on the credibility of the witnesses, the contemporaneous complaint to Kelone (Exhibit D-1), the sick call sheet (Exhibit D-5) and the testimony of the plaintiff, Allen and Truvia, the court finds that defendants Woods and McMillian used force on the plaintiff when there was no need to use any force at all, and that Mezo expressly condoned the use of force in this instance.

The court further finds that the force used resulted in minor bruises and swelling to the plaintiff's face, mouth and lip, and also damaged his partial plate sufficiently to make it unwearable for three to four months. During this time the plaintiff suffered no harm or medically adverse consequences due to the broken plate.

Plaintiff's injuries from the beating were minor and required no medical attention. They healed naturally without medical intervention. Plaintiff was seen by a medical specialist two day after the incident who observed no serious injuries and who felt no treatment was necessary.

APPLICABLE LAW

The focus of a section 1983 claim is on the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Monroe v. Pape, 365 U.S. 167, 184, 81 S.Ct. 473, 482 (1961) quoting U. S. v. Classic, 313 U.S. 299, 325-26, 61 S.Ct.

1031, 1043 (1941). To determine whether physical abuse by a prison guard constitutes an abuse of power, the court must consider three factors: the amount of force exerted relative to the need for its application, the extent of injury inflicted; and the motivation of the officers. Johnston v. Lucas, 786 F.2d 1254 (5th Cir. 1986); Williams v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980), cert. denied, 451 U.S. 1019 (1981). While these factors must be considered, it is not necessary that the injury received be severe to constitute a constitutional violation. U. S. v. Bigham, ____ F.2d ____ (5th Cir. 1987) (No. 86-2174, March 9, 1987). See, Wade v. Reed, 709 F.2d 345 (5th Cir. 1983) (suggesting that any injury suffices where no force is justified). Compare, Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981) (Fourteenth Amendment claim against city police officer).[1]

Here there was no need to use any force since the plaintiff was already in restraints. Since the plaintiff was harmed, the only explanation for it is the unnecessary use of force by Woods and McMillian. Mezo did not actually strike the plaintiff, but the credible testimony is that he was present, and in a position to stop Woods and McMillian, but instead acted only to temper their actions. This was an explicit approval of at least a

[1] This is not an isolated assault which arguably would remove the incident from the realm of "punishment" as that term is used in the Eighth Amendment. George v. Evans, 620 F.2d 495 (5th Cir. 1980). According to inmate Allen, after defendants Woods and McMillian finished with the plaintiff, they came back, shackled and cuffed Allen and then beat him also on the way to administrative lockdown.

limited beating. The defendants' conduct can only be seen as motivated by malice. All the defendants, by their acts of commission and omission, violated the plaintiff's rights under the Eighth Amendment by the use of unnecessary and excessive force.

Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 291 (1976), set the standard for proving Eighth Amendment deprivations of medical care: the plaintiff must prove "deliberate indifference to serious medical needs." The essential test is one of medical necessity and not one simply of desirability. Woodall v. Foti, 648 F.2d 268, 272 (5th Cir. 1981). The plaintiff proved he was injured, but his injuries were minor and healed without complication. Additionally, the plaintiff was aware of the sick call procedure and used it two days later. There was no proof that Mezo, Woods or McMillian denied the plaintiff access to sick call, even if they did not bring him to the hospital. His injuries were not obviously serious enough to warrant a hospital visit. No defendant deprived the plaintiff of his Eighth Amendment rights insofar as adequate medical care is concerned.

DAMAGES

Plaintiff proved only minor injuries to his back and mouth, and "a strange feeling" when eating for several months. He expressed no fear that any defendant would repeat the incident, nor did he testify about lost sleep, anxiety or depression caused by the incident. The beating was of short duration. The sum of

$800.00 is sufficient to compensate the plaintiff for his injuries.

Plaintiff did not pray for punitive damages in his complaint nor any subsequent pleading. Therefore, the court expresses no opinion on whether this is a proper case for the imposition of punitive damages.

Plaintiff's prayer for injunctive relief is unsupported by any evidence of irreparable harm nor any evidence that this incident was or will be repeated. Injunctive relief is not warranted.

CONCLUSION

Accordingly, judgment will be entered in favor of the plaintiff and against the defendants, in solido, for the sum of $800.00, plus interest from the date of judgment until paid and court costs.

Baton Rouge, Louisiana, April 30, 1987.

Stephen C. Riedlinger
UNITED STATES MAGISTRATE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

APPENDIX - A

No. 87-3394
(Summary Calendar)

KEITH J. HUDSON,

Plaintiff-Appellee,

versus

JACK McMILLIAN, CSO III, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-83-1385-A)

(July 31, 1990)

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:*

On appeal is a judgment rendered by a magistrate in favor of a prisoner who was physically mistreated by corrections officers. In light of the standards established by this court's intervening decision in **Huguet v. Barnett, 900 F.2d 838 (5th Cir. 1990), and progeny, however, we must reverse.**

Keith J. Hudson, a Louisiana state prisoner confined to Angola penitentiary invoked 42 U.S.C. § 1983 and sued corrections officers Jack McMillian, Marvin Woods, and Arthur Mezo. The parties consented to disposition of the case by a magistrate, 28 U.S.C. § 636(c). The evidence reflects that on October 30, 1983 Hudson got into an argument with McMillian who punched Hudson in the mouth, eyes, chest, and stomach while Woods held him. The blows cracked Hudson's partial dental plate, split his lower lip and loosened his teeth. He received bruises to his body but no other cuts. Woods kicked Hudson on his backside. Mezo, the supervisor of McMillian and Woods, watched the beating but merely cautioned the officers not to "have too much fun."

Hudson appeared at sick call on October 31 and November 1, 1983 with a dental complaint; his medical record contains no reference to facial bruises or other injuries.

In awarding Hudson a modest judgment the magistrate credited the testimony of Hudson, rejecting that of the officers, and concluded that "defendants Woods and McMillian used force on the plaintiff when there was no need. . . . the force used resulted in minor bruises and swelling to the plaintiff's face, mouth and lip. . . . [p]laintiff's injuries

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

from the beating were minor and required no medical attention." Defendants timely appealed.

This court joins the magistrate in deploring the use of unnecessary force in the treatment of prisoners. Hopefully someday this blight on our criminal justice system will be forever removed. However not every use of excessive force rises to a constitutional violation cognizable under 42 U.S.C. § 1983.

In our recent decision in Huguet v. Barnett we announced the standard to be applied in excessive force claims made by prisoners under the eighth amendment. We there held that to prevail in such a claim four elements must be proven:

> 1. a significant injury, which
> 2. resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was
> 3. objectively unreasonable, and
> 4. the action constituted an unnecessary and wanton infliction of pain.
>
> If any one of these elements fails, so too does the plaintiff's claim.

900 F.2d at 841.

In the case at bar no force was required; therefore, the force used was objectively unreasonable. The conduct of McMillian and Woods qualified as clearly excessive and occasioned unnecessary and wanton infliction of pain.

Hudson's claim, however, founders on the significant injury prong.

Huguet evolved from our en banc decision in Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989), a fourth amendment excessive-force case. We there held that minor harms do not rise to constitutional proportions. In awarding recovery the magistrate characterized Hudson's injuries as "minor" and noted that they "required no medical attention." The injuries sustained by Hudson are not unlike those at issue in our recent decision in Wise v. Carlson, 902 F.2d 417 (5th Cir. 1990), which were held not to constitute a significant injury. In Wise the inmate sustained bruises to the anterior chest wall and right forearm and a hematoma to his right upper eyelid. The Wise case injuries were insufficient to base a section 1983 claim; Hudson's injuries are likewise insufficient.

For these reasons the judgment is REVERSED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-3394

KEITH J. HUDSON,

Plaintiff-Appellee,

versus

JACK McMILLIAN, CSO III, ET AL.,

Defendants-Appellants.

APPENDIX-B

Appeal from the United States District Court for the Middle District of Louisiana

---

ON PETITION FOR REHEARING

(September 4, 1990)

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

Henry A. Politz
United States Circuit Judge

REHG-4

QUESTIONS PRESENTED

1. Did the Fifth Circuit apply the correct legal test when determining that Petitioner's claim that his Eight Amendment rights under the Cruel and Unusual Punishment Clause was not violated as the result of a single incident of force by the respondents which did not cause a significant injury?

LIST OF PARTIES

The parties to the proceedings below in the United States Court of Appeals for the Fifth Circuit were petitioner Keith J. Hudson, a prisoner at the Louisiana State Penitentiary and the respondents Jack McMillian, Marvin Woods, and Arthur Mezo, all correctional security officers at the Louisiana State Penitentiary.

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NUMBER: 90-6531

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

KEITH HUDSON
PETITIONER

VERSUS

JACK MCMILLAN, MARVIN WOODS,
AND ARTHUR MEZO
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

The respondents, Jack McMillian, Marvin Woods, and Arthur Mezo, respectfully request that This Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's Opinion in this case. That Opinion is unreported.

STATEMENT OF THE CASE

Petitioner, Keith J. Hudson, (Prisoner Hudson) is a prisoner confined at the Louisiana State Penitentiary (L.S.P.) which is a maximum security prison housing only adult male's

convicted of felonies by a Louisiana state court. Respondents, Jack McMillian, Marvin Woods, and Arthur Mezo, are all correctional officers working at L.S.P.

Prisoner Hudson invoked 42 U.S.C. § 1983 and sued Corrections Officers McMillian, Woods and Mezo in the United States District Court for the Middle District of Louisiana alleging that his Fifth, Fourteenth and Eighth Amendment rights were violated because excessive and unnecessary force was used on him. The parties consented to having the case adjudicated before a Magistrate Judge pursuant to 28 U.S.C. § 636 (c). Following a bench trial before the Magistrate Judge, the factual determination was made that on October 30, 1983 Prisoner Hudson while in restrains, got into an argument with Corrections Officer McMillian who punched Prisoner Hudson in the mouth, eyes, chest, and stomach while Corrections Officer Woods kicked Prisoner Hudson on his backside. During this physical alteration Corrections Officer Mezo, the supervisor of Corrections Officers McMillian and Woods, watched the beating but did nothing to stop it.

As a result of this physical altercation Prisoner Hudson alleged that his partial dental plate was cracked, his lower lip was split and his teeth loosened. Prisoner Hudson also claimed that he received bruises to his body but no other cuts. A review of Prisoner Hudson's medical record revealed that he appeared at sick call on October 31, and November 1, 1983 with a dental complaints; his medical records made no reference to facial bruises or other cuts nor did Prisoner Hudson make complaints

about other injuries. None of the alleged injuries required any medical care. The alleged injuries were short in duration and had no lasting effect.

The Corrections Officers denied that they used any force on Prisoner Hudson on October 30, 1983. The Magistrate Judge gave creditability to Prisoner Hudson's and his fellow prisoner's testimony and not that of the Corrections Officers. The Magistrate Judge found that the force used was totally unnecessary and resulted in minor bruises and swelling to Prisoner Hudson's face, mouth and lip. The Magistrate Judge concluded that Prisoner Hudson's injuries were minor and required no medical treatment. Based on these factual findings the Magistrate Judge found that the Corrections Officers violated Prisoner Hudson's Eighth Amendment right to be free from the application of excessive and unnecessary force and awarded Eight Hundred Dollars ($800.00) in retrospective money damages.

The Corrections Officers appealed to the United States Court of Appeal for the Fifth Circuit. A panel of the Fifth Circuit accepting the findings of fact as true applied the legal test for such claims as set out in Huguet v. Barnett, 900 F. 2d 838, 841 (5th Cir. 1990). This legal test had not been established prior to the ruling by the District Court. Accepting the factual determinations of the District Court and applying the intervening legal test set out in Huguet, the Fifth Circuit concluded that Prisoner Hudson did not prove the essential element of significant injury under his Eight Amendment claim.

The Fifth Circuit reversed the judgment of the District Court. Prisoner Hudson filed for a rehearing before the Fifth Circuit, which was denied. He now seeks review in this Court.

(REASON FOR DENYING THE WRIT)

THE FIFTH CIRCUIT APPLIED THE CORRECT LEGAL TEST TO PRISONER HUDSON'S CLAIM

Prisoner Hudson appears to be arguing in his petition that the legal test applied by the District Court rather than the legal test applied by the Fifth Circuit was the proper legal test to apply to the facts of his claim. (Petition p. 3-4) Corrections Officers McMillian, Woods and Mezo assert that the legal test applied by the Fifth Circuit was the proper legal test to apply to the facts of Prisoner Hudson's claim.

This suit presents the prototypical example of prisoner pro se litigation under 42 U.S.C. § 1983 that proliferates in the lower federal courts. This suit involves a single isolated incident in which a state prisoner alleges that he has been mistreated by one or more State Corrections Officers. This suit, like so many others that involve single instances of alleged mistreatment by State Corrections Officers, boils down solely to a question of credibility - the prisoners giving one story, the corrections officers another, and a lack of demonstrative evidence to support either side. In the instant suit Prisoner Hudson and his fellow prisoner witnesses claimed that physical force was used on Prisoner Hudson by Correction Officers McMillian and Woods while Corrections Officer Mezo watched.

Corrections Officer Woods denied that any physical force was used on Prisoner Hudson by either himself or Corrections Office McMillian. There was no documentary evidence to support use of physical force or any injuries which might have resulted. The allegations of Prisoner Hudson as to the use of force and resulting injuries were corroborated by testimony of two fellow prisoners. The trier of fact gave credibility to the prisoners' story and not the Corrections Officers' story. The trier of law then applied a subjective balancing test in which the existence of any single factor could establish a violation of the Eighth Amendments' Cruel and Unusual Punishment Clause. However, the Fifth Circuit as trier of the law applied a four part essential element test the to facts as found by the trier of fact and determined that Prisoner Hudson did not meet his burden of proof on the essential element of significant injury. It is the four part essential element test of the Fifth Circuit which should be applied to this type Eight Amendment claim.

This Court has determined that excessive force claims brought by prisoners against corrections officers fall solely under the Eighth Amendment's Cruel and Unusual Punishment Clause. Graham v. Connor, 490 U.S. 386, 398-399 (1872-1873), (1989) citing Whitley v. Albers, 475 U.S. 312, 320-321 (1986). There can be absolutely no question that Prisoner Hudson's claim, therefore, rest solely and wholely under the Eighth Amendment's Cruel and Unusual Punishment Clause. Thus Prisoner Hudson's assertions as to his alleged claims under the Fifth and Fourteenth Amendments are without legal merit.

In Whitley this Court dealt with the question of excessive and unnecessary force by correctional personnel on prisoners under the Eight Amendment. In Whitley, however, the need for the use of force was factually present and undisputed, only the degree of need was factually in dispute. Id. 475 U.S. at 320-321. In Whitley the existence of a significant injury was factually present - severe damage to leg and severe mental and emotional distress. Id. 475 U.S. at 317. In the instant case whether or not any force was used at all was factually disputed by the Corrections Officers, therefore, no proof of its need was or could have been presented. Additionally, the injuries alleged by Prisoner Hudson as the result of the force were minor at best. Therefore, the balancing test presented in Whitley provides little if any guidance to the trier of the law for the type of claim raised by Prisoner Hudson. Their is little or no predictability in regards to the out come under Whitley as applied to the facts in the instance case since the extent of the injury is minor and the need for the use of force is not present as a matter of fact. The legal balancing test in Whitley does not work in the prototypical prison suit because the result is unpredictable and provides absolutely no guidance as to what would constitute a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause.

Under the balancing test as applied by the District Court in the instant case allows for an Eighth Amendment violation based solely on a single factor and a determination of credibility. This makes the Cruel and Unusual Punishment Clause

a liars contest, rather than a constitutional prohibition. The legal test applied by the Fifth Circuit in the instant case provides for a usable and effective test which has a high degree of predictability regardless of the various factual scenarios.

The legal test in the Fifth Circuit which is applied to all excessive force claims made by prisoners under the Eighth Amendment's Cruel and Unusual Punishment Clause is:

1. A significant injury, which;
2. Resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was;
3. Objectively unreasonable, and;
4. The action constituted an unnecessary and wanton infliction of pain.

Each of these four elements must be proven in order for a prisoner to prevail on his excessive and unnecessary force claim under the Eighth Amendment's Cruel and Unusual Punishment Clause. Huguet v. Barnett, 900 F. 2d 838, 841 (5th Cir. 1990) (cite other 5th Cir. cases)

The focus of § 1983 is on the "[M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Monroe v. Pope, 365 U.S. 167, 184 (1961) quoting U.S. v. Classic, 313 U.S. 299, 325-326 (1941). § 1983 does not, however, reach all misuses of power even if done by those clothed with the authority of state law. § 1983 reaches only those misuses of power which rise to constitutional proportions. See: City of

Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985) Not every use of force by corrections officers on prisoners arises to constitutional proportions. Only those uses of force by correction officers on prisoners which shock the conscious of mankind arise to constitutional proportions. Whitley v. Albers, 475 U.S. at 319-320.

This Court has made it clear that mere torts do not rise to constitutional proportions merely because they are committed within a prison setting. This is true whether the act is based on negligence or intentional misconduct. Daniels v. Williamas, 474 U.S. 327 (1986), Davidson v. Cannon, 474 U.S. 344 (1986), Hudson v. Palmer, 468 U.S. 517 (1984) and Paratt v. Taylor, 451 U.S. 527 (1981). The misuse of power must be so serious as to shock the conscious of mankind. Whitley v. Albers, 475 U.S. at 310-320. The mere fact that the misuse of power has no penological purpose is not sufficient to raise a prisoner's claim to the level of cruel and unusual punishment unless a significant injury results. See: Estelle v. Gamble, 429 U.S. 97, 104-107 (1976). Merely because an injury is sustained by a prisoner at the hands of a corrections officer does not create an Eighth Amendment claim. See: Davidson v. Cannon, 474 U.S. at 332-334 and Estelle v. Gamble, 429 U.S. at 104-107. Unless proof of a significant injury exists under the Fifth Circuit's legal standard no Eighth Amendment claim can exist. Under the Fifth Circuit's legal standard all claims similar to that of Prisoner Hudson correctly belong in state rather than federal court. Using the balancing test set out by the District Court in the

instant case every touching in a prison setting becomes a claim of cruel and unusual punishment. The four part essential element test set out by the Fifth Circuit is the correct legal standard to be applied to excessive for claims by state prisoners. Unless this legal standard is used constitutional law under the Cruel and Unusual Punishment Clause will become a mere matter of credibility devoid of any legal standard.

The Fifth Circuit has applied the four part essential element test to a number of prisoner cases. Gilbert v. Collins, 905 F. 2d 61 (5th Cir. 1990), Adams v. Hansen, 906 F. 2d 192 (5th Cir. 1990), Williams v. Luna, 909 F. 2d 121 (5th Cir. 1990), Wesson v. Oglesby, 910 F. 2d 278 (5th Cir. 1990), Oliver v. Collins, 914 F. 2d 56 (5th Cir. 1990). Only one other circuit has examined the Fifth Circuit's four part essential element test. The Sixty Circuit has specifically rejected the use of significant injury or essential elements in excessive force claims arising out of state prisons. See: McHenry v. Chadwick, 896 F. 2d 184 (6th Cir. 1990)

The Fifth Circuit applied the proper legal test to facts in the instant case. There is no basis for reversing the Opinion of the Fifth Circuit in the instant case.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Joseph Erwin Kopsa, a member of the Bar of This Court, hereby certify that on this 12th day of March 1991, three copies of the Respondents Brief in Opposition in the above entitled case was mailed, first class postage prepaid, to Keith J. Hudson, D.O.C. Camp J, Shark Unit #4-L-11, Louisiana State Penitentiary, Angola, Louisiana 70712, pro se for petitioner herein. I further certify that all parties required to be served have been served.

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Supreme Court, U.S.
FILED
JUN 4 1991
OFFICE OF THE CLERK

No. 90-6531

In The

Supreme Court of the United States

October Term, 1990

KEITH J. HUDSON,

Petitioner,

vs.

JACK McMILLIAN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed November 19, 1990
Certiorari Granted April 15, 1991

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RELEVANT DOCKET ENTRIES

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UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF LOUISIANA

KEITH J. HUDSON #91888
Camp J – Cuda 1-R-3
Angola, Louisiana

Enter above the full name of the plaintiff or plaintiffs in this action

VERSUS

CSO II Jack McMillian
CSO II Marvin Woods
Lt. Arthur Mezo

Enter above the full name of the defendant or defendants in this action

COMPLAINT

I. PREVIOUS LAWSUITS:

a. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes ( ) No (X)

b. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

Plaintiffs: _____

_____

Defendants: _____

_____

2. Court (if federal court, name the district; if state court name the parish):

_____

_____

3. Docket number: _____

4. Name of Judge to whom case was assigned:

_____

5. Disposition (for example, was the case dismissed? Was it appealed? Is it still pending?):

_____

6. Approximate date of filing lawsuit: _____

7. Approximate date of disposition: _____

II. PLACE OF PRESENT CONFINEMENT: La. State Penitentiary, Angola, La.

a. Is there a prisoner grievance procedure in this institution?

Yes ( ) No (X)

b. Did you present the facts relating to your complaint in the prisoner grievance procedure?

Yes ( ) No (X)

c. If your answer is YES:

1. What steps did you take? There is no grievance procedure. However, letters were written to the Camp Supervisor Major D. Klone [sic] and Warden Ross Maggio, Jr.

2. What was the result? Major Kalone having personally seem [sic] my condition had me sent to the hospital then placed in Administration Ld.

d. If you answer is NO, explain why not? There is no prisoner grievance procedure employed here and only the above mention [sic] action was taken.

III. PARTIES:

(In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

a. Name of plaintiff: Keith J. Hudson #91888

Address: La. State Pen., Angola, La. Camp J Cuda 1-R-3

(In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.)

b. Defendant CSO II Jack McMillian is employed as Correctional Sargant [sic] at La. State Pen. Camp J

c. Additional Defendants: CSO II Marvin Woods and Lt. Arthur Mezo, all are employed at La. State Penitentiary as Correctional Officers at Camp J

IV. STATEMENT OF CLAIM:

State here as briefly as possible the FACTS of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. DO NOT GIVE ANY LEGAL ARGUMENTS OR CITE ANY CASES OR STATUTES. If you intend to allege a number of related

claims, number and set forth each claim in a seperate [sic] paragraph. (Use as much space as you need. Attach extra sheets if necessary.)

SEE ATTACHED

I.

On the morning of October 30, 1983, I was written up by Officer Marvin Woods who claimed I had called him all types of disrespectful names, which allegation is untrue and merely instigated by officer Jack McMillian, who has a background and reputation for unjust and unnecessary harrassment [sic]. Lt. Mezo came to the area and wanted to know what the problem was and I explained to him that these officers were harrassing [sic] me for no vaild [sic] reason and that I had been written up also for no vaild [sic] reason. At this time Officer Woods told me that I had better shut my mouth if I knew what was good for me. When I asked him why he was threatening me he stated that he was and what could I do about it. I asked Lt. Mezo did he hear that and he said "No"; inmate Edward Allen stated that he heard it. Lt. Mezo told Allen that he had better shut [sic] before he would be in for it also. Allen tried to explain that these two officers were harrassing [sic] for no reason. Lt. Mezo told both Edward Allen and myself to pack our stuff that we were going to lockdown.

II.

While waiting to be transferred to administrative lockdown I was given two disciplinary reports (1) alleging that inmate Allen and I were arguing with each other and that we had to be locked up because we were creating a disturbance on the teir [sic], (2) and the other was for alleged obscenity to an officer; neither are lock up offenses and these charges were only engineered for insidious reasons.

III.

After being handcuffed & Shackled and under full restraint, I was led from my cell into the lobby of Cuda 1, and at that time Officers Woods and McMillian began shoving me against the wall, and Lt. Mezo motioned with his hands, and these officers took me outside on the walk way of Cuda and began punching me in the face and kicking me; officer McMillian told officer Woods to hold me still so he could knock my gold teeth out of my mouth, and officer McMillian began punching me repeatedly in the mouth, and at that time Lt. Mezo came outside and said "don't have to [sic] much fun", and officer Woods was hitting me in the back and then walked me to Cuda 3 door where I was then taken to Cell #9 in lockdown.

IV.

After being uncuffed inside the cell, bleeding and swelling about the face and brusied [sic] about the body, I asked to be taken to the hospital for my injuries which were extensive. Officer Woods told me to catch sick call and then Lt. Mezo came to my cell and asked me what the problem was attempting to make the inmates in lockdown think he was unaware of what had happened to me. I told Lt. Mezo that he knew that I need [sic] to go to the hospital and he knew what the problem was, Lt. Mezo then told me that nothing was wrong with me and walked off.

After the shift changed I requested of CSO II Wendell Arnold to see the Captain or Lt. the time was approx. 5:a.m. At approx. 11;30 [sic] a.m. Lt. Dubroc came and I asked him to please allow me to go to the hospital and he told me to hold on; I waited all day until 6: p.m. when the shift had changed again and the same shift that had abused me had come back on duty, Captain L. Dupont came to my cell and asked what had happened, but before

I could explain Lt. Mezo whispered in his ear and they walked off.

Monday October 31, 1983 upon shift change again I asked Officer Glynn Blades to see the Lt. or Captain, this officer ignored me. When I received breakfast I told Cadet King that I couldn't eat and I needed to see the Captain or Lt. and he replied "Ok". I saw nobody until I went to D.B. Court. I informed the Court that I had been beaten, however, the court was not interested in my explaination [sic] even though it was apparent that I had been beaten and had received no type of medical treatment. They said that their only concern was the reports before then [sic] and not me, the D.B. Board was Major James Teer and a Classification Officer by the name of Williams and I was represented by inmate counsel Tony Roberts. After leaving Court I saw Capt. Merridth and asked him could I go to the hospital, Capt. Merridth told me this and I quote "I would like to but if I send you over there now they are only going to say that you did it to yourself."

Upon shift change I asked to see the Capt. or the Lt., at maybe 11:p.m. Capt Cole came and I explained my stroy [sic], and he told me that I would be placed on sick call. On November 1, 1983 I was [sic] the Medical Technician and gave him my jnjuries [sic]. Late [sic] on during the day Major Kalone came and talked to me and asked my problem and I told him about the whole incident, he left and later I was told that I was going back to my living quaters [sic] and then I was taken to the Hospital and examined by a doctor who checked my injuries and had me put on call out to see the dentist.

V. **RELIEF:**

State briefly exactly what you want the court to do for you. MAKE NO LEGAL ARGUMENTS. CITE NO CASES OR STATUTES.

That I be awarded compensatory damages in the amount of Fifty Thousand ($50,000.00) Dollors [sic] for physical, mental, and emotional anguish due to the unjust and unnecessary beating given by the defendant and the total disregard for providing medical treatment by the ranking security personel [sic]. And further that injunctions be placed against the officers directly involved to prohibit further crulity [sic] to myself and other inmates housed at Camp J.

Signed this _____ day of _____, 19 ___.

_____

_____

_____

(Signature of Plaintiff or Plaintiffs)
(Jurat Omitted In Printing)

_____

D-1

CA83-1385-1
10/30/83 3:00

TO: Major Davie Kelone

Sunday morning. . . .

FROM: Inmate Keith J. Hudson
Camp J. Cuda #1-R-3

Copy:

RE: Harrassment, [sic] Beating, Denied Medical Treatment by Lt. Mezo CSO Marvin Woods CSO Jack McMiller

Dear Sir;

On the above date and time, while cleaning up my cell accordingly to posted policy, Officer Jack McMiller, shouted and told me to, "get my black ass to sleep," and I know that there aint no rule posted stating when an inmate should sleep, and this officer came down the tier calling me all kind of bitches & whores, and I refused to answer his profanity, and was written up.

(Harrassment [sic])

Lt. Mezo came and CSO Marvin Woods, trying to provoke me to get me gassed down, but I kept my silence, and was called "sorry mother fucker" by Officer Woods, and was told by the Lt. to pack my shit! (for no reason) So I packed my property and lift it in my cell, and on my trek to Adm. L/d, CSO Woods & McMiller began punching me in the face, and kicking me, and lacerated my lip and loosen [sic] my teeth, and I asked to go to the hospital, and was told to catch sick call, and I would

appreciate an imediate [sic] investigation, which shall be followed up on by a civil suit.

Sincerely,

/s/ Keith Hudson
#91888

D-2

DISCIPLINARY REPORT

PART 1- DISCIPLINARY REPORT

1. Name of Prisoner	2. Number	3. Date of Incident
Keith Hudson	91888	10-29-83

4. Time of Incident	5. Place of Incident
2:50 am	Cuda 1 R 3

6. Job Assignment(Prisoner)

Ext L/D

7. Housing Assignment(Prisoner)

Cuda 1 (J HOLE)

8. Rule Violated	9. Rule Number
Defiance	3

10. Description of Incident (Include all relevant information, use other side, if necessary)

On the above date and time the abovenamed and numbered inmate was arguing with the inmate in cell #4. I gave the above inmate several direct verbal orders to stop the loud disturbance but he refused and told [sic] to get the fuck out of his face you sorry mother fucker.

11. Signature of reporting employee

/s/ Marvin Woods

12. Name, Title, Assignment (PRINT)

Marvin Woods, CSO II

13. Report (copy) given to above prisoner by:

MW

14. Plea by Prisoner: [X] Not Guilty [ ] Guilty

15. Verdict: [ ] Not Guilty [X] Guilty

16. Date of Hearing

10-31-83

17. Counsel Substitute (Counsel)

/s/ S Roberts

18. Summary of the evidence and reasons for the decision:

Inmate found guilty basedon [sic] Inmate Hudson's only defense was a denial of the report and the credibility of the officers statements. The senteence [sic] was based on Inmate Hudson's very poor conduct record

19. Sentence Suspended

combine 2 reports 10 days isol [ ]

20. Disciplinary officer:

21. Disciplinary Board: /s/ Illegible Chairman

_____ Member

/s/ Illegible Member

Sign 7 copies. (Give inmate one copy and forward 6 copies to disciplinary office).

D-3

11-2-83

TO: DAVY KELONE, MAJOR

FROM: GARY DUBROC, LT.

RE: STATEMENT

ON 10-30-83 THERE WAS ONLY ONE INMATE THAT REQUESTED TO GO TO THE HOSPITAL ON THIS DATE AND THAT INMATE WAS JOHN POULLARD ON GATOR-3-LEFT BECAUSE OF CHEST PAINS. THIS INMATE WAS SENT TO THE NGH AT 3:30 P.M. NOTHING ELSE UNUSUAL THAT I COULD FIND ON THIS DATE.

GARY DUBROC, LT.

/s/ Gary Dubroc, Lt.

D-4

11-2-83

TO: MAJOR KELONE

FROM: MARVIN WOODS, CSO II

RE: KEITH HUDSON, #91888

ON THE MORNING OF 10-30-83 AT APPROXIMATELY 2:40 A.M. I WENT DOWN THE TIER ON CUDA-1 RIGHT BECAUSE INMATE HUDSON AND INMATE EDWARD ALLEN WERE CAUSING A DISTURBANCE. I WENT DOWN THE TIER AND GAVE THE ABOVE INMATES SEVERAL DIRECT VERBAL ORDERS TO STOP HOLLERING. AFTER SEVERAL DIRECT VERBAL ORDERS, INMATE HUDSON STARTED HOLLERING AND CURSING AT ME. I TOLD CSO II MCMILLIAN CALL THE LIEUTENANT. LT. MEZO ARRIVED ON CUDA UNIT AND TOOK CHARGE OF THE SITUATION. LT. MEZO AND I ESCORTED INMATE HUDSON TO ADM. L/D. AT NO TIME DID I OR LT. MEZO USE ANY PHYSICAL FORCE ON THIS INMATE.

MARVIN WOODS, CSO II

/s/ Marvin Woods
Sgt.

D-5

SICK CALL SHEET

Date 11-1-83

Name /s/ Keith Hudson Number 91888 Location J

Complaint: Teeth

J.G.D.

Treatment or Prescription:

Dental Illegible

7-20-83 T PC

/s/ (illegible)

Medical Specialist

D-6(1)

11-2-83

TO: DAVY KELONE, MAJOR

FROM: JACK MCMILLIAN, CSO II

RE: KEITH HUDSON, #91888

ON THE MORNING OF 10-30-83, LT MEZO WAS CALLED ABOUT A DISTURBANCE ON CUDA-1-RIGHT TIER.

LT. MEZO CAME DOWN TO TAKE CONTROL OF THE SITUATION. INMATE KEITH HUDSON BEGAN HOLLERING AND CURSING AT OFFICER WOODS WHO WAS ON THE TIER WITH LT. MEZO. INMATE HUDSON WAS ESCORTED TO ADM. L/D BY LT. MEZO AND CSO II WOODS. AT NO TIME DID I, KICK, HIT OR USE ANY OTHER TYPE FORCE ON INMATE KEITH HUDSON.

CSO II JACK MCMILLIAN

/s/ Jack McMillian
c-team CSO II

D-6(2)

11-2-83

TO: DAVY KELONE, MAJOR

FROM: LT. ARTHUR MEZO

RE: KEITH HUDSON, #91888

ON 10-30-83 AT APPROXIMATELY 2:45 A.M., I WAS CALLED TO CUDA UNIT BY CSO II JACK MCMILLIAN

WHO TOLD ME THAT TWO INMATES ON CUDA-1-RIGHT TIER WERE ARGUING LOUDLY AND COULD NOT GET THEM QUIET. WHEN I ARRIVED ON CUDA UNIT, I FOUND OUT THAT IT WAS INMATE KIETH [SIC] HUDSON, #91888 AND EDWARD ALLEN, #92784 IN CELLS CUDA-1-RIGHT 3&4, RESPECTIVELY WHO WERE ARGUING. BOTH INMATES WERE WRITTEN UP FOR VIOLATION OF RULES #3 & #5 AND WERE PLACED IN ADM. L/D.

PER MEMORANDUM, I PERSONALLY ESCORTED BOTH INMATES, SEPARATELY, FROM CUDA-1-RIGHT TO ADM. L/D ON CUDA-3 AND AT NO TIME DID CSO II MCMILLIAN OR CSO II WOODS NOR I, HIT, KICK, OR USE ANYOTHER [SIC] TYPE OF PHYSICAL FORCE ON INMATE HUDSON, AS HE STATES IN HIS LETTER. CSO II MCMILLIAN WAS NOT EVEN AROUND INMATE HUDSON ON HIS WAY TO ADM. L/D. CSO II MCMILLIAN REMAINED ON CUDA 1&2.

AT NO TIME DURING THE REMAINDER OF THE SHIFT, SUNDAY MORNING, NOR THE SHIFT OF 10-30-83, SUNDAY EVENING, DID INMATE HUDSON BRING TO MY ATTENTION THATHE [SIC] NEEDS MEDICAL TREATMENT, NOR DO I RECALL BEING ON THE TIER, CUDA-3-LEFT, WHILE CAPTAIN DUPONT TALKED TO INMATE HUDSON OR IF CAPTAIN DUPONT TALKED TO HIM AT ALL.

I AGAIN DENY ALL ALLEGATIONS BROUGHT TO YOUR ATTENTION BY INMATE HUDSON AS I ASSURE YOU INMATE HUDSON WAS PLACED IN ADM. L/D FOLLOWING ALL RULES, REGULATIONS AND PROCEDURES SET FORTH BY THE LOUISIANA STATE

PENITENTIARY, DEPARTMENT OF CORRECTIONS, AND CAMP "J".

LT. ARTHUR MEZO

/s/ Lt Arthur C Mezo

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

KEITH J. HUDSON — CIVIL ACTION

VERSUS — NUMBER 83-1385-A

JACK McMILLIAN, CSO III, ET AL

OPINION

This matter is before the court following a trial on the merits on March 10, 1987.

Plaintiff, an inmate at Louisiana State Penitentiary, Angola, Louisiana, brought this action pursuant to 42 U.S.C. § 1983 against corrections officers Jack McMillian, Marvin Woods and Arthur Mezo.

The plaintiff had consented to disposition of this case by a magistrate pursuant to 28 U.S.C. § 636(c) on November 26, 1986 and the defendants consented on December 9, 1986. An order of reference was entered on December 11, 1986. When the case was called for trial, the plaintiff moved for a continuance, which was denied. The parties were then requested to confirm on the record that they had consented to trial before the magistrate. *Archie v. Christian,* 808 F.2d 1132 (5th Cir. 1987). The defendants affirmed their consent, but the plaintiff stated he wished to revoke his consent. Plaintiff stated no reason for wishing to do so.

While consent must be voluntarily given, there is no corresponding right to revoke it if later developments in the case, now before the magistrate, indicate to a party

that tactically he would be better off before a district judge. Although one district judge or magistrate may be more or less lenient with a pro se litigant in terms of how a case is tried or may evaluate a pro se plaintiff and his witnesses more or less favorably than another judge or magistrate, these considerations are not sufficient to permit a party who has voluntarily consented to a bench trial before the magistrate to withdraw that consent immediately before the trial begins. *See, Southern Agriculture Co. v. Dittmer,* 568 F.Supp. 645 (D. Ark. 1983).

Nor does the fact that in this particular case the magistrate could have converted the trial to an evidentiary hearing under section 636(b)(1)(B) and the district court's original reference of this case to the magistrate on June 4, 1984 justify allowing the plaintiff to revoke his consent. For his own reasons, the plaintiff consented. He did not indicate that his consent was coerced or given under any threats. *See, Adams v. Heckler,* 794 F.2d 303 (7th Cir. 1986). His attempt to revoke it following immediately on the heels of a denied motion for a continuance was an obvious attempt to delay the trial at the last moment. Therefore, the plaintiff's revocation of his consent will not be accepted.

This case involves an alleged beating of the plaintiff by defendants McMillian and Woods. Plaintiff also claims that Mezo, a lieutenant, stood by while the other two defendants beat the plaintiff. Plaintiff further claims that the defendants denied his repeated requests for medical attention.

Edward Allen testified that on October 30, 1983 in the early morning hours he was housed on the same tier as

the plaintiff at Camp J in an adjacent cell. An argument occurred between him and the plaintiff, but no real disturbance took place. Plaintiff had been washing his clothes in his cell. Woods came down the tier and "had words" with the plaintiff. McMillian also approached the plaintiff's cell and told the plaintiff to shut up. Allen said Woods had what he characterized as a nasty attitude toward inmates.

While Allen said he could hear what was going on, he could not see it clearly because of the way the cells are constructed. He saw the plaintiff being removed from his cell. Then, he testified, he heard the plaintiff hollering and what sounded like "licks" – blows – being "passed." Later Allen was removed from his cell and also beaten by Woods and McMillian.

Later, the plaintiff told Allen he had been beaten and his mouth had been injured. Plaintiff showed Allen his face, mouth and broken front brace. Allen specifically recalled a bruise on the plaintiff's lip. Allen testified that when the plaintiff left his cell he was handcuffed and shackled, offered no resistance and was not visibly bruised or swollen.

On cross examination, Allen confirmed that he recognized the voices of McMillian and the plaintiff as he, Allen, had been on that tier for a few months and the plaintiff was there when he arrived. Also, Woods and McMillian had been working there also before his arrival.

Allen testified that McMillian kept speaking to the plaintiff in a provocative manner.

Allen said he was aware that the plaintiff had written to Major Dave Kelone to complain about the incident and asked for an investigation (Exhibit D-1), but did not recall actually seeing the letter nor whether Kelone spoke to him, Allen, during the investigation.

Inmate Earl Truvia also testified that on October 30, 1983 he was housed at Camp J, Cuda 3-4 Unit. He heard a commotion early that morning at about 1:45 a.m. which sounded like punches and scuffling and he heard screams.

On November 1, 1983 he saw the plaintiff in the yard. Plaintiff had bruises on his lip and over one eye, and a swollen cheek. He saw no blood or cuts. Plaintiff told Truvia he was involved in an incident with the security guards.

Truvia admitted that he did not see any scuffle and that the time could have been as late as 3:00 or 4:00 a.m., but he thought it was between 1:45 and 2:30 a.m. Truvia could not tell from the sounds he heard whether it was the plaintiff involved in the scuffle, and he heard only one incident.

Hudson testified that he had an argument – "passed words," as he calls it – and McMillian said he would be back with something for the plaintiff. McMillian came back shortly and the two had more words. McMillian told the plaintiff to pack his belongings because he was going to the dungeon (administrative lockdown). Woods arrived to assist McMillian. After leaving his cell in restraints, Woods and McMillian walked with the plaintiff to administrative lockdown. On the way, plaintiff testified, McMillian commented to Woods about knocking

the plaintiff's teeth out and then McMillian punched the plaintiff in the eye, chest and mouth, while Woods held the plaintiff by the back of the plaintiff's jumpsuit and kicked and punched the plaintiff in the back. Plaintiff testified that Mezo came out and told them "not to have too much fun."

Plaintiff testified that he asked Captain James Cole also to put him on the sick call list. Plaintiff emphatically testified that he did tell the sick call man he had been beaten. Plaintiff stated he had no problems with his partial plate prior to this incident. The plate was not usable until it was repaired in February 1984, plaintiff testified. In the meantime, he could eat satisfactorily, although it felt strange.

Plaintiff testified that when he went to his disciplinary board hearing he asked to be sent to the hospital, but the board refused to discuss his request.

Defendants called Officer James Cole. He testified that normally the shift supervisor or an escort officer escorts an inmate to lockdown. An officer who abuses an inmate is subject to disciplinary action, and probably discharge, in an incident such as the one described by the plaintiff. He added that if an incident of the use of force is reported it is investigated to either confirm or refute the allegations. This procedure is for the protection of the officer if the charges are unfounded. Cole did not recall seeing the plaintiff on October 31, 1983 nor did he recall any incident of brutality at Camp J.

Gary Dubroc testified that he was a sick call man at Camp J in 1983. He said he saw the plaintiff on October 31 or November 1, 1983 but the plaintiff did not ask to be

sent to the hospital. He added that if the plaintiff had told him that security officers had beaten the plaintiff, he would have sent him to the hospital. Dubroc admitted on rebuttal that the sick call sheet dated November 1, 1983 (Exhibit D-5) was not signed by him.

Marvin Woods denied that he used any force whatsoever against the plaintiff. The plaintiff was taken to lockdown by Lt. Mezo and himself, while McMillian remained behind. Woods testified that the plaintiff and Allen were arguing about the noise the plaintiff was making hand washing some clothes in his cell. Woods handcuffed the plaintiff and Mezo went with Woods and the plaintiff to lockdown where Mezo removed the handcuffs. Woods testified this would be in accordance with prison procedure requiring the shift supervisor to escort an inmate to lockdown since Mezo was the shift supervisor at the time.

Woods could recall no instance of brutality at Camp J. In his opinion, an inmate, even in full restraint, is always a threat. Woods testified he was not familiar with the provisions of the Eighth Amendment to the United States Constitution. However, he stated he would not inflict harm on an inmate except in the line of duty, but in doing his duty would do whatever was necessary, without limitation, to maintain security.

David Lemoine, a medical specialist, testified that he saw the plaintiff on November 1, 1983 at sick call. Plaintiff had some dental complaint at that time. Had the plaintiff complained of a beating causing loose teeth it would have been noted on the sick call sheet. However, the plaintiff appeared to be in no acute distress (NAD) as

is noted on the sick call sheet. Exhibit D-5. Lemoine explained under cross examination that NAD means the observed condition is not life threatening and no immediate attention is required. Lemoine noted on the sick call sheet that the plaintiff had been scheduled for dental call out since July 1983. Lemoine did not notice any swelling or bruises, and if he had, he would have noted it on his sick call sheet, he testified.

While there is conflicting testimony about almost all aspects of this case, the testimony about the use of force is the most divergent. According to the plaintiff, Woods and McMillian, with Mezo's express approval, beat the plaintiff totally without justification or need. This is supported by the testimony of Allen. The plaintiff's injuries were corroborated by Truvia. Needless to say, all of these are convicted felons.

The defendant who testified, Woods, denied that any force whatsoever was used against the plaintiff. The medical records do not show that the plaintiff was sent to the hospital on October 30, 1983. The first medical record entry is November 1, 1983 which notes a problem with the plaintiff's teeth of an unspecified nature. Other defense witnesses denied the plaintiff sought medical attention from them. The plaintiff testified that he repeatedly sought medical attention but was refused. He argued that by refusing his requests, the plaintiff would not be able to produce contemporaneous medical records to document his injuries. Defendants introduced reports by Mezo and McMillian for the limited purpose of showing that they reported an incident, but the court refused to admit the reports for the truth of their contents since

neither defendant testified, and counsel for these defendants did not urge any hearsay exception in support of their admissibility.

Plaintiff did write a letter of complaint to the camp major, Dave Kelone (Exhibit D-1) the same day of the incident, which was received on November 2, 1983, complaining of the beating meted out by Woods and McMillian.

FINDINGS OF FACT

Based on the credibility of the witnesses, the contemporaneous complaint to Kelone (Exhibit D-1), the sick call sheet (Exhibit D-5) and the testimony of the plaintiff, Allen and Truvia, the court finds that defendants Woods and McMillian used force on the plaintiff when there was no need to use any force at all, and that Mezo expressly condoned the use of force in this instance.

The court further finds that the force used resulted in minor bruises and swelling to the plaintiff's face, mouth and lip, and also damaged his partial plate sufficiently to make it unwearable for three to four months. During this time the plaintiff suffered no harm or medically adverse consequences due to the broken plate.

Plaintiff's injuries from the beating were minor and required no medical attention. They healed naturally without medical intervention. Plaintiff was seen by a medical specialist two days after the incident who observed no serious injuries and who felt no treatment was necessary.

APPLICABLE LAW

The focus of a section 1983 claim is on the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Monroe v. Pape,* 365 U.S. 167, 184, 81 S.Ct. 473, 482 (1961) quoting *U.S. v. Classic,* 313 U.S. 299, 325-26, 61 S.Ct. 1031, 1043 (1941). To determine whether physical abuse by a prison guard constitutes an abuse of power, the court must consider three factors: the amount of force exerted relative to the need for its application, the extent of injury inflicted; and the motivation of the officers. *Johnston v. Lucas,* 786 F.2d 1254 (5th Cir. 1986); *Williams v. Kelley,* 624 F.2d 695, 697 (5th Cir. 1980), *cert. denied,* 451 U.S. 1019 (1981). While these factors must be considered, it is not necessary that the injury received be severe to constitute a constitutional violation. *U. S. v. Bigham,* ___ F.2d ___ (5th Cir. 1987) (No. 86-2174, March 9, 1987). *See, Wade v. Reed,* 709 F.2d 345 (5th Cir. 1983) (suggesting that any injury suffices where no force is justified). *Compare, Shillingford v. Holmes,* 634 F.2d 263 (5th Cir. 1981) (Fourteenth Amendment claim against city police officer).[1]

Here there was no need to use any force since the plaintiff was already in restraints. Since the plaintiff was

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[1] This is not an isolated assault which arguably would remove the incident from the realm of "punishment" as that term is used in the Eighth Amendment. *George v. Evans,* 620 F.2d 495 (5th Cir. 1980). According to inmate Allen, after defendants Woods and McMillian finished with the plaintiff, they came back, shackled and cuffed Allen and then beat him also on the way to administrative lockdown.

harmed, the only explanation for it is the unnecessary use of force by Woods and McMillian. Mezo did not actually strike the plaintiff, but the credible testimony is that he was present, and in a position to stop Woods and McMillian, but instead acted only to temper their actions. This was an explicit approval of at least a limited beating. The defendants' conduct can only be seen as motivated by malice. All the defendants, by their acts of commission and omission, violated the plaintiff's rights under the Eighth Amendment by the use of unnecessary and excessive force.

Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 291 (1976), set the standard for proving Eighth Amendment deprivations of medical care: the plaintiff must prove "deliberate indifference to serious medical needs." The essential test is one of medical necessity and not one simply of desirability. *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981). The plaintiff proved he was injured, but his injuries were minor and healed without complication. Additionally, the plaintiff was aware of the sick call procedure and used it two days later. There was no proof that Mezo, Woods or McMillian denied the plaintiff access to sick call, even if they did not bring him to the hospital. His injuries were not obviously serious enough to warrant a hospital visit. No defendant deprived the plaintiff of his Eighth Amendment rights insofar as adequate medical care is concerned.

DAMAGES

Plaintiff proved only minor injuries to his back and mouth, and "a strange feeling" when eating for several

months. He expressed no fear that any defendant would repeat the incident, nor did he testify about lost sleep, anxiety or depression caused by the incident. The beating was of short duration. The sum of $800.00 is sufficient to compensate the plaintiff for his injuries.

Plaintiff did not pray for punitive damages in his complaint nor any subsequent pleading. Therefore, the court expresses no opinion on whether this is a proper case for the imposition of punitive damages.

Plaintiff's prayer for injunctive relief is unsupported by any evidence of irreparable harm nor any evidence that this incident was or will be repeated. Injunctive relief is not warranted.

CONCLUSION

Accordingly, judgment will be entered in favor of the plaintiff and against the defendants, in solido, for the sum of $800.00, plus interest from the date of judgment until paid and court costs.

Baton Rouge, Louisiana, April 30, 1987.

/s/ Stephen C. Illegible
UNITED STATES
MAGISTRATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3394
(Summary Calendar)

KEITH J. HUDSON,

Plaintiff-Appellee,

versus

JACK McMILLIAN, CSO III, ET AL.,

Defendants-Appellants.

Appeal from the United States
District Court for the Middle
District of Louisiana (CA-83-1385-A)

(July 31, 1990)

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:*

On appeal is a judgment rendered by a magistrate in favor of a prisoner who was physically mistreated by

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

corrections officers. In light of the standards established by this court's intervening decision in Huguet v. Barnett, 900 F.2d 838 (5th Cir. 1990), and progeny, however, we must reverse.

Keith J. Hudson, a Louisiana state prisoner confined to Angola penitentiary invoked 42 U.S.C. § 1983 and sued corrections officers Jack McMillian, Marvin Woods, and Arthur Mezo. The parties consented to disposition of the case by a magistrate, 28 U.S.C. § 636(c). The evidence reflects that on October 30, 1983 Hudson got into an argument with McMillian who punched Hudson in the mouth, eyes, chest, and stomach while Woods held him. The blows cracked Hudson's partial dental plate, split his lower lip and loosened his teeth. He received bruises to his body but no other cuts. Woods kicked Hudson on his backside. Mezo, the supervisor of McMillian and Woods, watched the beating but merely cautioned the officers not to "have too much fun."

Hudson appeared at sick call on October 31 and November 1, 1983 with a dental complaint; his medical record contains no reference to facial bruises or other injuries.

In awarding Hudson a modest judgment the magistrate credited the testimony of Hudson, rejecting that of the officers, and concluded that "defendants Woods and McMillian used force on the plaintiff when there was no need. . . . the force used resulted in minor bruises and swelling to the plaintiff's face, mouth and lip. . . . [p]laintiff's injuries from the beating were minor and required no medical attention." Defendants timely appealed.

This court joins the magistrate in deploring the use of unnecessary force in the treatment of prisoners. Hopefully someday this blight on our criminal justice system will be forever removed. However not every use of excessive force rises to a constitutional violation cognizable under 42 U.S.C. § 1983.

In our recent decision in Huguet v. Barnett we announced the standard to be applied in excessive force claims made by prisoners under the eighth amendment. We there held that to prevail in such a claim four elements must be proven:

1. a significant injury, which
2. resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was
3. Objectively unreasonable, and
4. the action constituted an unnecessary and wanton infliction of pain.

If any one of these elements fails, so too does the plaintiff's claim.

900 F.2d at 841.

In the case at bar no force was required; therefore, the force used was objectively unreasonable. The conduct of McMillian and Woods qualified as clearly excessive and occasioned unnecessary and wanton infliction of pain. Hudson's claim, however, founders on the significant injury prong.

Huguet evolved from our en banc decision in Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989), a fourth amendment excessive-force case. We there held that minor

harms do not rise to constitutional proportions. In awarding recovery the magistrate characterized Hudson's injuries as "minor" and noted that they "required no medical attention." The injuries sustained by Hudson are not unlike those at issue in our recent decision in Wise v. Carlson, 902 F.2d 417 (5th Cir. 1990), which were held not to constitute a significant injury. In Wise the inmate sustained bruises to the anterior chest wall and right forearm and a hematoma to his right upper eyelid. The Wise case injuries were insufficient to base a section 1983 claim; Hudson's injuries are likewise insufficient.

For these reasons the judgment is REVERSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3394

KEITH J. HUDSON,,

Plaintiff-Appellee,

versus

JACK McMILLIAN, CSO III, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Louisiana

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ON PETITION FOR REHEARING

(September 4, 1990)

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

No. 90-6531

Keith J. Hudson,

Petitioner,

v.

Jack McMillian, et al.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 15, 1991

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(5)

Supreme Court, U.S.
FILED
JUL 10 1991
OFFICE OF THE CLERK

No. 90-6531

In The

Supreme Court of the United States

October Term, 1991

KEITH J. HUDSON,

Petitioner,

v.

JACK McMILLIAN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

1. Whether the court of appeals erred in holding that the Eighth Amendment cannot be violated by the beating of a prisoner by guards unless the beating results in significant injury, when it accepted the trial court's findings that respondents acted with malice, that they did not need to use any force against petitioner, and that the force inflicted unnecessary and wanton pain.

LIST OF PARTIES

The petitioner, Keith J. Hudson, is a prisoner at the Louisiana State Penitentiary (hereinafter "Angola") in Angola, Louisiana. The respondents are Jack McMillian, Marvin Woods and Arthur Mezo, all correctional security officers at Angola.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, entered on July 31, 1990, is reported at 929 F.2d 1014 and is reprinted in the Joint Appendix separately filed (hereinafter "App.") at p.30. The unreported trial court opinion is also reprinted in the Joint Appendix. App. at 19.

JURISDICTION

Petitioner filed this action on December 29, 1983. The district court had jurisdiction of the case pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The trial court conducted a trial on March 10, 1987, and issued an opinion and judgment in favor of the petitioner on April 30, 1987. Respondents filed a notice of appeal on May 26, 1987. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit, reversing the trial court, were issued on July 31, 1990. A timely petition for rehearing was denied by the court of appeals on September 4, 1990. The petition for writ of certiorari was filed on November 19, 1990, and the Court granted the petition and the motion for leave to proceed *in forma pauperis* on April 15, 1991. On April 29, 1991, the Court appointed the undersigned as counsel for the petitioner and amended the April 15, 1991 order granting the petition to limit the question under review.

STATUTES INVOLVED

This case involves 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1343 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

This action was filed by the petitioner, a prisoner at the Louisiana State Penitentiary (Angola) acting without counsel,[1] in 1983. The complaint alleged that on October 30, 1983, the petitioner had an exchange of words with respondents and was given two disciplinary reports. He was then placed in handcuffs and shackles "and under full restraint." App. at 6. He was led from his cell by the respondents, correctional officers Woods and McMillian, and thereafter, while Woods held petitioner and hit him in the back, McMillian repeatedly punched him in the face.[2] The complaint also alleged that respondent Mezo, a correctional officer lieutenant, observed the beating and told the other two officers, "[D]on't have to[o] much fun." *Id*. The complaint further stated that petitioner suffered bleeding and swelling about the face and bruises about the body, and was denied medical care. Finally, the complaint sought "compensatory damages . . . for physical, mental, and emotional anguish due to the unjust and unnecessary beating" and asked "that injunctions be placed against the officers directly involved to prohibit further cru[el]ty" to petitioner and other prisoners at Angola. *Id*. at 8.

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[1] Petitioner proceeded *pro se* until the appointment of counsel by this Court on April 29, 1991.

[2] The petitioner was hit nine or ten times by Officer McMillian. Transcript p.80. (References to the trial transcript are designated hereinafter as "Transcript p. ___.") Officer Woods was six feet, one inch tall and weighed two hundred thirty pounds. Officer McMillian was "about six one, two hundred pounds." Transcript p.103. Respondent Woods estimated that the petitioner weighed "a hundred and seventy, a hundred and eighty pounds." Transcript p.122.

The trial court conducted a trial on the merits on March 10, 1987. The petitioner, respondent Woods and various witnesses for both sides testified and certain exhibits were admitted into evidence. On April 30, 1987, the trial court issued an opinion and judgment in favor of petitioner.

After reviewing the testimony and evidence in some detail, App. at 20-26, the trial court found that the respondents " . . . Woods and McMillian used force on the plaintiff when there was no need to use any force at all, and that [respondent] Mezo expressly condoned the use of force in this instance." *Id.* at 26. The trial court also found that "the force used resulted in minor bruises and swelling to the plaintiff's face, mouth and lip, and also damaged his partial plate sufficiently to make it unwearable for three to four months." *Id.*

The trial court, after reviewing some other use of force cases, stated:

> Here there was no need to use any force since the plaintiff was already in restraints. Since the plaintiff was harmed, the only explanation for it is the unnecessary use of force by Woods and McMillian. Mezo did not actually strike the plaintiff, but the credible testimony is that he was present, and in a position to stop Woods and McMillian, but instead acted only to temper their actions. This was an explicit approval of at least a limited beating. *The defendants' conduct can only be seen as motivated by malice.* All the defendants, by their acts of commission and omission, violated the plaintiff's rights under the Eighth Amendment by the use of unnecessary and excessive force.

Id. at 27-28. (Emphasis added.)

Finding that the "[p]laintiff proved only minor injuries to his back and mouth, and 'a strange feeling' when eating for several months," the trial court ruled that $800.00 was "sufficient to compensate the plaintiff for his injuries," and entered judgment for the plaintiff in this amount. *Id.* at 28-29.

The respondents appealed and the court of appeals accepted the factual findings of the trial court. The *per curiam* opinion of the court of appeals states:

> The evidence reflects that on October 30, 1983 Hudson got into an argument with McMillian who punched Hudson in the mouth, eyes, chest, and stomach while Woods held him. The blows cracked Hudson's partial dental plate, split his lower lip and loosened his teeth. He received bruises to his body but no other cuts. Woods kicked Hudson on his backside. Mezo, the supervisor of McMillian and Woods, watched the beating but merely cautioned the officers not to "have too much fun."

App. at 31.

The court of appeals went on to say that it "joins the magistrate in deploring the use of unnecessary force in the treatment of prisoners. Hopefully someday this blight on our criminal justice system will be forever removed." *Id.* at 32.

Nonetheless, the court of appeals applied the standard announced in its recent decision in *Huguet v. Barnett*, 900 F.2d 838 (5th Cir. 1990). That standard requires proof of the following elements:

1. the plaintiff suffered a significant injury;
2. the injury resulted directly and solely from a use of force that was clearly excessive to the need;
3. the use of force was objectively unreasonable; and
4. the action constituted an unnecessary and wanton infliction of pain.

If any one of these elements is absent, the plaintiff's claim fails. *Id.* at 841.

The court of appeals concluded that "[i]n the case at bar no force was required; therefore, the force used was objectively unreasonable. The conduct of McMillian and Woods qualified as clearly excessive and occasioned unnecessary and wanton infliction of pain." App. at 32. Because "Hudson's claim, however, founders on the significant injury prong" (*id.*), the court of appeals reversed the judgment of the trial court.

The judgment of the court of appeals was entered on July 31, 1990. A timely petition for rehearing was denied by the court of appeals on September 4, 1990. The petition for writ of certiorari was filed on November 19, 1990, and this Court granted the petition and the motion for leave to proceed *in forma pauperis* on April 15, 1991. On April 29, 1991, the Court appointed the undersigned as counsel for the petitioner.

SUMMARY OF ARGUMENT

The opinion of the court of appeals in this case unambiguously holds that, had the petitioner suffered a more

significant injury,[3] the judgment in his favor would have been affirmed. The findings of the trial court that there was no need for any force, and that the respondents acted with malice, and inflicted unnecessary and wanton pain, do not, in the view of the court of appeals, give constitutional import to the injuries sustained by petitioner. This cramped view of the Eighth Amendment is inconsistent with the repeated and clear holdings of this Court that it is the "unnecessary and wanton infliction of pain" that "constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)); *see also Wilson v. Seiter*, 59 U.S.L.W. 4671 (6/17/91). The precise question before this Court, therefore, is whether the court of appeals erred by superimposing a "significant injury" requirement on petitioner's otherwise valid Eighth Amendment claim. Petitioner submits that the court of appeals did err, and that its decision should be reversed with instructions to reinstate the judgment of the district court.

It has long been clear that physical injury is not a prerequisite for all Eighth Amendment claims. Not all physical injury causes pain, much less "significant" injury.[4] Indeed, the annals of torture and coercive

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[3] Even if some injuries from the excessive use of force by guards are so trifling that in some circumstances they do not trigger the protections of the Eighth Amendment, the facts in this case do not involve trivial or *de minimis* injuries.

[4] While truly *de minimis* inflictions of pain or other injury may not violate the Eighth Amendment, the lower court's "significant injury" test cannot be equated to a *de minimis* injury test, particularly in view of the facts of this case.

interrogation – and, in some instances, of penology – reveal many ingenious means of inflicting excruciating pain without visible or lasting injury, such as electric shock to sensitive areas and beating with rubber hoses. Nor is all pain physical in nature, a point recognized not only by the lower courts in prison brutality cases but by this Court in *Trop v. Dulles*, 356 U.S. 86 (1958), in which the Court held the punishment of denationalization to be unconstitutional in large part because "[i]t subjects the individual to a fate of ever-increasing fear and distress." *Id.* at 101-102.

Contrary to the position urged by the respondents, the extent of injury is probative of the amount of force actually used and the existence or absence of justification, but is not determinative of a constitutional violation. Here, there was *no* need for force, since the prisoner was in restraints and was held by one of the officers while the other beat him. In addition, the force used – repeated punches to the face and a kick to the back – was patently designed to inflict pain and injury rather than to bring the prisoner under control.

The trial court properly analyzed these factors and concluded that "[t]he defendants' conduct can only be seen as motivated by malice." App. at 28. There is no question that pain was inflicted, and no question that it was "unnecessary and wanton." No more is needed to prove an Eighth Amendment violation.[5] The court of

[5] The respondents' argument, which was not addressed by the court of appeals, that an isolated incident of brutality cannot violate the Eighth Amendment has been implicitly rejected by this Court and has been abandoned by the Fifth Circuit itself. *See* Section III, *infra*.

appeals' imposition of a "significant injury" requirement is without support in history, logic, or the text of the Eighth Amendment.

ARGUMENT

I. THERE IS NO BASIS FOR IMPOSING A "SIGNIFICANT INJURY" REQUIREMENT IN EIGHTH AMENDMENT USE OF FORCE CLAIMS

A. This Court's Eighth Amendment Decisions Focus on Whether Pain Was Inflicted, Not Whether a Significant Injury Resulted

The cases of this Court analyzing prisoners' claims under the Eighth Amendment consider whether the challenged acts inflicted pain, not whether a significant injury was sustained. Thus, for example, in *Whitley v. Albers*, 475 U.S. at 319, the Court held that a prisoner attempting to prove a violation of the Eighth Amendment must establish the "unnecessary and wanton infliction of pain." *See also Wilson v. Seiter*, 59 U.S.L.W. at 4671 (rejecting the proposition "that the 'wantonness' of conduct depends upon its effect upon the prisoner"); *Ingraham v. Wright*, 430 U.S. 651, 670 (1977); and *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). This is true whether the issue under scrutiny involves general conditions of confinement, *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); medical care, *Estelle v. Gamble*, 429 U.S. at 103; or security measures undertaken to restore order during a prison disturbance, *Whitley v. Albers*, 475 U.S. at 319. " '[U]nnecessary and wanton inflictions of pain' [include] those that are 'totally without penological justification.' " *Rhodes v. Chapman*, 452 U.S. at 346 (quoting *Gregg v. Georgia*, 428 U.S. at 183).

Accordingly, while the relevant considerations for establishing an Eighth Amendment violation may vary depending on the type of conduct under review,[6] there is no suggestion in these or other cases that a significant

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[6] "The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Whitley*, 475 U.S. at 320.

Because the trial court found that the correctional officers acted with malice toward the petitioner, this case does not present the Court with the need to determine whether the "malicious and sadistic" state of mind standard that *Whitley* applied in the context of a prison riot governs other use of force situations. *Cf. Dudley v. Stubbs*, 109 S.Ct. 1095, 1097 (1989) (mem.) (O'Connor, J., dissenting from denial of certiorari) (arguing that full *Whitley* standard should be applied to prison officials' "splitsecond decision[s]" made in the face of serious threats to the security of the prison facility). Nor is the Court presented with the question of whether the Fifth Circuit's four-part use of force test is erroneous *in toto*, since the petitioner satisfied all the other elements of that standard. Accordingly, if the Court agrees with petitioner that significant injury is not a prerequisite to a § 1983 prison brutality claim, the Court need merely reverse with instructions to reinstate the judgment of the district court.

Similarly, there is no need to reach the respondents' claim that an isolated incident of guard brutality is insufficient to state a claim. The trial court specifically found that the incident was not isolated and the court of appeals did not disturb this finding. As discussed in Section III, *infra*, the view that isolated incidents of brutality are not actionable under the Eighth Amendment is inconsistent with this Court's decisions and appears to have been abandoned by the court of appeals in the formulation of its new standard.

physical injury is a prerequisite to establishing a violation.[7]

In *Estelle*, the Court held that the denial of medical care is cruel and unusual because, "[i]n the worst cases, [it can result in] physical 'torture or a lingering death,' the evils of most immediate concern to the drafters of the Amendment." 429 U.S. at 103. (Citation omitted.) However, the Court did not confine its reading of the Eighth Amendment to torturous conduct. It emphasized that, even "[i]n less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose." *Id.* (Citations omitted.) This violates the Eighth Amendment because "[t]he infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation . . . " *Id.*

In the case at bar, the court of appeals' focus on the severity of the injury rather than the wantonness of the pain inflicted on the prisoner is inconsistent with this Court's specific affirmation that mistreatment of prisoners less extreme than physical torture can violate the Eighth Amendment. In some cases the failure to treat a prisoner's serious medical needs, such as a denial of necessary anesthesia or pain medication, could cause

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[7] "There may be involved no physical mistreatment, no primitive torture," *Trop v. Dulles*, 356 U.S. at 101 (deprivation of citizenship); *accord, Weems v. United States*, 217 U.S. 349 (1910) (long prison sentence under oppressive conditions); *Robinson v. California*, 370 U.S. 660 (1962) (criminal punishment for status of drug addiction).

agonizing pain but might not result in further injury. The offense to the Eighth Amendment occurs when a prisoner is subjected to unnecessary pain, regardless of other injury.[8]

Consistent with the emphasis on the infliction of unnecessary pain and suffering, the Court in *Rhodes* examined the impact of the challenged conditions on prisoners and considered whether the conditions resulted in the deprivation of life's basic necessities. 452 U.S. at 347.[9] The existence or severity of any resulting injury was simply not at issue in determining whether those conditions constituted cruel and unusual punishment. *Id.*

Similarly, in *Hutto v. Finney*, 437 U.S. 678 (1978), the Court upheld restrictions on the length of confinement in punitive isolation based on the district court's finding that conditions there constituted cruel and unusual punishment.

> Confinement in punitive isolation was for an indeterminate period of time. An average of 4, and sometimes as many as 10 or 11, prisoners were crowded into windowless 8' x 10' cells

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[8] *Estelle* certainly contemplates that some medical needs are so trivial that the failure to treat them is not of constitutional import. 429 U.S. at 104 ("We therefore conclude that deliberate indifference to *serious* medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain.' ") (Emphasis added). The failure to treat minor aches and pains does not shock the conscience. By contrast, a brutal and unprovoked beating at the hands of law enforcement personnel does shock the sensibilities, regardless of the presence or absence of a significant injury.

[9] *See also Wilson v. Seiter*, 59 U.S.L.W. at 4672.

> containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell. *Holt v. Sarver*, 300 F.Supp. 825, 831-832 (ED Ark.1969) (Holt I). At night the prisoners were given mattresses to spread on the floor. Although some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random in the evening. *Id.*, at 832. Prisoners in isolation received fewer than 1,000 calories a day; their meals consisted primarily of 4-inch squares of "grue," a substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan.

Id. at 682-683. (Footnotes omitted).

The Eighth Amendment offense in *Hutto* consisted of the conditions themselves, not of any physical injury that may have resulted. Indeed, it is probable that a number of the *Hutto* prisoners suffered no significant injury as a result of these conditions.

The Court's decision in *Whitley, supra*, is also entirely consistent with petitioner's argument. Under *Whitley*, as in all Eighth Amendment cases, the ultimate inquiry is whether the governmental action inflicted unnecessary and wanton pain. In the particular context of the use of force in a prison riot, the infliction of pain is unnecessary and wanton only if the use of force is malicious and sadistic. In determining whether the use of force violated the Eighth Amendment, the Court in *Whitley* cited with approval the test developed by Judge Friendly in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1972), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973). One of the

factors in the *Glick* test is the extent of the injury inflicted.[10] However, by describing the *Glick* factors as "relevant to th[e] ultimate determination" (475 U.S. at 321), *Whitley* makes clear that the extent of the injury inflicted is relevant precisely because it assists the fact finder in determining "whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Id.* (Citation omitted).

By its own terms *Whitley* thus contemplates that if there is a complete absence of justification for the use of force, the intentional application of any force, beyond *de minimis* force, is unconstitutional. The presence or absence of justification is the test.[11] The "extent of injury

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[10] *See Johnson v. Glick* at 1033:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

[11] A focus on the justification for the use of force, rather than upon the nature and extent of the resulting injury, has been the approach of the American Correctional Association in its Standards for Adult Correctional Institutions. (3d ed. 1990). *See* § 3-4198:

> Written policy, procedure, and practice restrict the use of physical force to instances of justifiable self-defense, protection of others, protection of property,

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inflicted" is probative of the amount of force used and whether that force was excessive; it also bears on the sum to be awarded as damages.[12] However, it is not an independent requirement. Any infliction of unnecessary pain, beyond *de minimis* pain, is sufficient to establish a constitutional violation if the other elements of an Eighth Amendment violation are present.

In *Graham v. Connor,* 109 S.Ct. 1865 (1989), the Supreme Court again endorsed a construction of the

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> and prevention of escapes, and then only as a last resort and in accordance with appropriate statutory authority. In no event is physical force justifiable as punishment. A written report is prepared following all uses of force and is submitted to administrative staff for review.

Comment:

> Correctional personnel should be prepared to justify their use of physical force. The phrase "as a last resort" may be defined through appropriate statutory authority.

[12] While actual damages must generally be proven to recover on a claim for violation of a substantive constitutional right, nominal damages are available in the absence of actual injury. *See Memphis Community School Dist. v. Stachura,* 477 U.S. 299, 308-309 n.11 (1986). Indeed, "[b]y making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed . . . or, in the case of exemplary or punitive damages, to deter or punish malicious deprivation of rights." *Id. See also Smith v. Wade,* 461 U.S. 30 (1983) (award of punitive damages to brutalized prisoner).

Eighth Amendment that focused on whether unnecessary pain had been inflicted:

> In *Whitley*, . . . [w]e began our Eighth Amendment analysis by reiterating the long-established maxim that an Eighth Amendment violation requires proof of the "unnecessary and wanton infliction of pain." We went on to say that when prison officials use physical force against an inmate "to restore order in the face of a prison disturbance, . . . the question whether the measure taken inflicted unnecessary and wanton pain . . . *ultimately turns* on whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." We also suggested that the other prongs of the *Johnson v. Glick* test might be useful in analyzing excessive force claims brought under the Eighth Amendment. But we made clear that this was so *not* because Judge Friendly's four-part test is some talismanic formula generally applicable to all excessive force claims, but because its four factors help to focus the central inquiry in the Eighth Amendment context, which is whether the particular use of force amounts to the "unnecessary and wanton infliction of pain."

109 S.Ct. at 1872-73 n.11. (Emphasis in original, citations and internal quotation marks omitted.) Accordingly, the Court in *Graham* repeated a formulation of the Eighth Amendment standard that requires the infliction of pain but does not include a requirement that the use of force inflict a significant injury. *See also Wilson v. Seiter*, 59 U.S.L.W. at 4671, 4673, rejecting the suggestion that there is some required minimum threshold of physical injury when it declined to accept respondents' argument that

the Eighth Amendment requires a higher level of culpability in cases which do not involve allegations of physical injury. The decision of the court of appeals in this case fails to take into account this Court's focus on pain rather than injury, and imposes a "significant injury" requirement without explanation or citation to authority other than its own.[13]

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[13] The Fifth Circuit, in a case subsequent to *Graham v. Connor*, has also applied a "significant injury" test in the Fourth Amendment area. *See Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) (*en banc*). The court of appeals cited *Morel* in support of its decision in this case. In Judge Rubin's concurring opinion in *Morel*, speaking for seven members of the court, he criticized the majority for adopting an injury requirement, and made the following observation:

> The *Graham* Court was at least given the opportunity to consider whether it should impose a "severe" injury requirement. In the amicus brief filed by the United States in *Graham*, the Solicitor General argued that the Court should adopt the reasonableness standard, but that:
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> > [A] "severe injury" requirement is . . . inappropriate. Under that standard, a police officer could, without any justification, beat a person on the head with a club if the beating causes only a bruise. Similarly, a police officer could terrorize a nondangerous suspect by pointing a gun at his head if the chambers of the gun are empty. In short, acceptance of the standard would allow the unreasonable use of force in cases where police conduct poses a grave risk and causes terror or even physical harm, but where the person seized, by chance, does not suffer a "severe injury."

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B. Petitioner's Position Is Supported by the History of the Eighth Amendment

This Court determines whether an act of punishment should be condemned as a violation of the Eighth Amendment by two routes: (1) whether the punishment was considered cruel and unusual at the time that the Eighth Amendment was adopted,[14] or (2) whether the punishment is contrary to evolving standards of decency. *Stanford v. Kentucky*, 109 S.Ct. 2969, 2974 (1989). Here there can be little doubt that the infliction of pain without penological purpose is inconsistent with evolving standards of decency.[15] Not surprisingly, therefore, the Court has long rejected the argument that "evolving standards of decency" require physical injury as a prerequisite for an Eighth Amendment claim.

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Although the Court did not rule on the question explicitly, its opinion surely contains no quantum-of-injury criterion.

Id. at 481 (footnote omitted).

[14] The prohibition on cruel and unusual punishments in the Eighth Amendment comes from the English Declaration of Rights of 1689. The English Declaration of Rights was in large part directed at punishments not authorized by statute. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L.Rev. 839, 860 (1969). This interpretation of the cruel and unusual punishment clause is consistent with a ban on beatings and other punishments unauthorized by statute.

[15] In the earliest cases raising Eighth Amendment claims, the Court focused on the cruelty of the challenged punishment. The Court's emphasis in these early cases on whether punishment was inhumane and involved the gratuitous infliction of

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For example, in *Weems v. United States*, 217 U.S. 349 (1910), the Court rejected a sentence of imprisonment under harsh conditions (a sentence to *"cadena dura"* under the Philippine Code) because the conditions of the sentence imposed pain. *Id.* at 366. Nothing in the sentence to *cadena dura* necessarily inflicted physical injury. For the first time the Court rejected the proposition that the Eighth Amendment reaches only punishments that are "inhuman and barbarous, – torture and the like." 217 U.S. at 368. The Court rejected the view that the Eighth Amendment "was intended to prohibit only practices like the Stuarts', or to prevent only an exact repetition of history." *Id.* at 373.

In *Trop v. Dulles*, 356 U.S. 86 (1958), this central principle was crystallized in the Court's pronouncement that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. In *Trop*, the Court struck down as inconsistent with the Eighth Amendment the punishment of denationalization, and thus followed

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suffering is entirely consistent with the modern day proscription against the unnecessary infliction of pain. *See Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (upholding death by shooting); *In re Kemmler*, 136 U.S. 436, 447 (1890) (electrocution). In these cases, the Court evaluated methods of execution by assessing their similarity to torture and other barbarous punishments. *See also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (second attempt at electrocution found not to violate Eighth Amendment, since failure of initial execution attempt was "an unforeseeable accident" and "[t]here [was] no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution").

Weems in invalidating under the Eighth Amendment a punishment that imposed no physical injury. The Court came to this conclusion, in part, because the condition of statelessness "subjects the individual to a fate of ever-increasing fear and distress." *Id.* at 101-102. No less is at issue here. Certainly, the lower court's refusal to protect prisoners from guard abuse similarly exposes them to anxiety and distress. The holding in *Trop* is thus manifestly inconsistent with the argument that a significant physical injury is required to state a violation of the Eighth Amendment.

Moreover, an assessment of "evolving standards of decency," as required by *Weems*, does not call for a subjective judgment. It requires, rather, that the Court look to objective indicia that reflect the public attitude toward a given sanction. *See Gregg v. Georgia*, 433 U.S. at 172-173, and *Stanford v. Kentucky*, 109 S.Ct. at 2975. "[F]irst among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society's elected representatives." *Stanford*, 109 S.Ct. at 2975. (Internal quotation marks omitted.) Both the federal government[16] and numerous states have specifically

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[16] *See* 18 U.S.C. § 241. In *U.S. v. Bigham*, 812 F.2d 943 (5th Cir. 1987), the court of appeals considered a criminal prosecution of guards under 18 U.S.C. §§241 and 242. One prisoner had suffered "a one and one half inch laceration over his eye, several burns, swollen testicles, and bruises and abrasions on the upper part of his body. The other [prisoner] suffered bruises and abrasions on the upper part of his body [, . . .] a blister on his foot," and blood in his stool the next day. *Id.* at 945. One of the guards claimed on appeal that the jury instructions should have required the jury to consider whether the

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criminalized the unnecessary use of force against prisoners;[17] no state has affirmatively approved such conduct. The public reaction to the events at Attica and the recent police beating in Los Angeles also demonstrates that American society condemns official brutality and abuse.

The Court's discussion in *Trop* also makes clear that a penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." 356 U.S. at 100. In striking down the deprivation of citizenship as a sanction for wartime desertion as cruel and unusual punishment, the Court in *Trop* stated that denationalization was "a form of punishment more

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prisoners' injuries were severe. The court of appeals cited with approval the trial court's instructions that "the Constitution protects persons from 'unauthorized violence' and that liberty 'includes the principle that no person may ever be physically assaulted, intimidated, or otherwise abused intentionally and without justification by a person acting under the color of the laws of any state.' " *Id.* at 949. It then upheld the findings of guilt, concluding that "[a]s excessiveness of force was not at issue in this trial, neither was there an issue of triviality of injury." *Id.*

[17] *See* Ala. Code Tit. 14, Sec. 14-11-1 (1975); Ariz. Rev. Stat. Ann. Sec. 31-127 (1986); Cal. Penal Code Ann. Tit. 1, Sec. 2652 (Supp. 1982); Fla. Stat. Ann. Sec. 944.36 (1985); Ga. Code Ann. Sec. 42-5-58 (1989); Idaho Code Ann. Sec. 18-706 (1987); Ind. Ann. Stat. Sec. 11-11-54 (1988); Kan. Stat. Ann. Sec. 21-3425 (1981); Miss. Code Ann. Sec. 47-1-27 (1972); Mo. Stat. Ann. Sec. 217-405 (1991); Neb. Rev. Stat. Sec. 83-4, 114 (1987); Nev. Rev. Stat. Ann. Sec. 209.371 (1986-1989); N.D. Code Sec. 12-47-26 (1985); Okla. Stat. Ann. Tit. 57, Sec. 9 (1969); Oreg. Rev. Stat. Ann. Secs. 421.105(2), 421.990(2) (1989); S.D. Code Sec. 24-2-10 (Rev. 1988); Tex. Crim. Proc. Code Ann. Arts. 1.09, 16.21, 43.24; Vt. Stat. Ann. Sec. 853 (1986).

primitive than torture, for it destroys for the individual the political existence that was centuries in the development." *Id.* at 101.

Surely American society has evolved to the point where the unprovoked beating of prisoners is inconsistent with human dignity and violates contemporary "standards of decency." A finding of cruel and unusual punishment does not depend upon the use of physical violence like the strap, the rack, or the wheel of old. The horrors of the "Tucker Telephone" and the whipping post,[18] common to Arkansas prisons of the past, should not be encouraged to return. Yet abusive and sometimes sadistic practices continue in our prisons. In one recent case involving the strip search of a prisoner, the guard ordered the prisoner to spread his legs further apart and tapped the inside of his legs with a riot stick. When the prisoner involuntarily giggled, the guard said "Oh, you think that's funny, huh?" and attempted to plunge the riot stick into the prisoner's anus. Because of the force used, the guard ruptured one of the prisoner's hemorrhoids. On these facts, an Eighth Amendment violation was properly found. *McRorie v. Shimoda*, 795 F.2d 780, 781-84 (9th Cir. 1986). *See also Parrish v. Johnson*, 800 F.2d 600 (6th Cir. 1986) (proof that officer waved knife in paraplegic prisoner's face, extorted food from him, taunted him verbally, and failed to relay requests for

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[18] The "Tucker Telephone" was used to administer electrical shocks to various sensitive parts of a prisoner's body. *Hutto v. Finney*, 437 U.S. at 682 n.5. Prisoners were also routinely lashed with a wooden-handled leather strap five feet long and four inches wide, some until their skin was bloody and bruised. *Id.* at n.4.

medical care so that he lay in his own feces for hours, established Eighth Amendment violation).

Although prisoners surrender many rights upon conviction, they retain the right to be free from the terror of instant and unexpected brutality at the hands of their jailers. In both of the examples given above, while the extent of the resultant injury may be debated, the cruelty of the officers and the pain caused by their malicious acts cannot. Whatever force may be necessary to manage a prison population and to protect the safety of guards and prisoners, the gratuitous and unprovoked infliction of pain is simply unacceptable. The offense to the Eighth Amendment is in the brutalization of the prisoner – not the severity of the resulting injury. This judgment should not change merely because the guards are clever enough to leave no marks.

Not only do these practices demean the human dignity of the prisoner involved, but because they reflect the extent to which society will tolerate such practices, they affect us all. Implicit in the Court's opinion in *Trop* is the concept that in this society there are certain standards of human decency that limit the kind of punishment officials may inflict on anyone, regardless of his or her offense. Though this case may deal with prisoners, how society punishes those who may be viewed as its least deserving members ultimately cannot be separated from the constitutional protections that shelter all Americans from official abuse.[19]

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[19] "Prison is, after all, the largest power that the state exercises in practice, on a regular basis, over its citizens. . . .

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The decision of the court of appeals in this case, while "deploring the use of unnecessary force in the treatment of prisoners," tacitly gives its imprimatur to such practices. App. at 32.[20] While the court of appeals expressed hope that "someday this blight on our criminal

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Perhaps if we can bring principle and justice to the exercise of the power of imprisonment, much else will improve in the uneasy tensions between freedom and authority in post-industrial society." Norval Morris, *The Future of Imprisonment* (1974), p.2.

[20] A classic prison simulation study illustrates the danger of loosening constraints on the use of force by correctional officers. In this study, a mock "prison" was constructed in the basement of the psychology building at Stanford University. The subjects were middle-class, white male college students, specifically selected for physical and mental health, maturity, and lack of previous involvement in anti-social behavior. On a random basis, half of the subjects were assigned the role of "guard," the other half that of "prisoner." Haney, Banks and Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 Int'l J. Criminology and Penology 69, 73 (1973).

Except for the fact that the "guards" were explicitly forbidden to use physical force on the "prisoners," the "prison" was designed to be as realistic as possible. The "prisoners" remained in the "prison" twenty-four hours a day; the "guards" worked eight-hour shifts. Both "prisoners" and "guards" wore uniforms; the "prisoners" were assigned jobs, had recreation and exercise periods, and were counted three times a day. *Id.* at 74-77.

The experiment, which had been scheduled to run for two weeks, had to be terminated after only six days. In that time, five of the ten "prisoners" had to be released because of

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justice system will be forever removed," its opinion is a step in the opposite direction. *Id.*[21]

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extreme depression, crying, rage, and acute anxiety. Meanwhile, the "guards" steadily escalated their harassment of and aggression against the "prisoners," especially when they thought they were not being watched by the experimenters. "[W]e witnessed a sample of normal, healthy American college students fractionate into a group of prison guards who seemed to derive pleasure from insulting, threatening, humiliating and dehumani[z]ing their peers. . . . Most dramatic and distressing to us was the observation of the ease with which sadistic behavior could be elicited in individuals who were not "sadistic types" and the frequency with which acute emotional breakdowns could occur in men selected precisely for their emotional stability." *Id.* at 89.

Many other studies confirm that ordinary people will perform acts of appalling cruelty when they believe such behavior is encouraged or condoned by those in authority. *See, e.g.*, Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 Human Relations 57 (1965) (in response to experimenter's instruction, subjects repeatedly administered what they believed to be increasingly high-voltage electrical shocks to a person strapped in an electric chair in an adjacent room, even after the "victim" protested that he was in pain, demanded to be released from the experiment, pleaded that he had heart trouble, and finally ceased to respond altogether except to shriek in agony).

These dramatic results suggest that there are forces inherent in the prison environment that can lead to abuse of prisoners by correctional officers. If this is the case, the need for an unequivocal, bright-line rule against such behavior is especially clear. Officers should not be told, explicitly or implicitly, that an "insignificant" beating is acceptable.

[21] In a very recent opinion from a district court in the Fifth Circuit, the court applied the Fifth Circuit "significant injury"

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II. THE HOLDING OF THE COURT OF APPEALS IS INCONSISTENT WITH THE DECISION OF EVERY OTHER COURT OF APPEALS THAT HAS EXPRESSLY CONSIDERED THIS ISSUE

The facts of this case in no sense involve trivial or *de minimis* injuries. The court of appeals noted that the evidence reflected that, while one guard restrained the

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standard to affirm the finding of the magistrate that a beating incident did not violate the Eighth Amendment, and reversed a judgment in the prisoner's favor based on a Fourteenth Amendment failure to protect claim arising from an incident in which other prisoners scalded the plaintiff with boiling water.

In the course of applying the "significant injury" test, Chief Judge Parker, who presides in the same judicial district where the case at bar arose, and has heard countless excessive force claims initiated by prisoners confined at Angola, said the following:

> This court is, of course, bound by all Fifth Circuit precedent and must apply it. The court feels compelled to note, however, that the "significant injury" standard established by *Huguet* and its progeny seems destined to encourage venal prison guards in their deliberate use of force upon inmates. When the courts tell correctional officers that they are free to use force at will, provided they stop short of what the Fifth Circuit calls "significant injury," the courts in effect pronounce an "open season" upon inmates which is likely to encourage unrestrained correctional officer use of force and violence in penal institutions. Ultimately, there is strong probability of an increasing number of "significant injuries" to be inflicted by correctional officers who did not know when to stop.

Williams v. Blackburn, 761 F.Supp. 24, 26 (M.D.La. 1991).

prisoner, the other punched him in the mouth, eyes, chest, and stomach. The blows cracked the prisoner's partial plate, split his lower lip, loosened his teeth, and bruised him. One of the guards kicked his backside, while the supervisor watched the beating and cautioned the guards against "hav[ing] too much fun." App. at 31. It would cripple the Eighth Amendment to decide that such conduct by public officials does not constitute cruel and unusual punishment because it did not impose a significant injury.[22]

With the exception of the Fifth Circuit, the lower courts have been essentially unanimous in their view that unprovoked beatings by correctional officers violate the Eighth Amendment. While "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights" (*Johnson v. Glick*, 481 F.2d at 1033),[23] the application of force "for the very purpose of causing harm"

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[22] Indeed, even if this Court were to decide that the Eighth Amendment standard does require, in this context, a significant injury, the Court should reverse the judgment of the court of appeals and reinstate the judgment in favor of petitioner because, as a matter of law, the petitioner did sustain a significant injury as a result of the beating.

[23] Petitioner agrees that not every "push or shove" states an Eighth Amendment claim. *See, e.g., Black Spotted Horse v. Else*, 767 F.2d 516 (8th Cir. 1985) (allegation that guard pushed prisoner against cubicle wall and poked him in the back with his arm or finger). But some shoves may suffice. *See H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1085-86 (11th Cir. 1986) (guard gratuitously slammed juvenile prisoner into wall for "giggling").

(*Whitley*, 475 U.S. at 321, quoting *Johnson v. Glick*, 481 F.2d at 1033), can serve no legitimate governmental purpose. *Whitley* at 321-22 (The "wide-ranging deference" normally accorded prison officials "does not insulate from review actions taken in bad faith and for no legitimate purpose"). Heeding this Court's instruction to determine the necessity for the use of force, the lower courts have concluded that official force directed toward illicit ends may offend the Constitution even though the same amount of force deployed in aid of a legitimate official purpose would not.

One court has aptly commented on facts very similar to those presented here, in a case in which the defendants argued that the injuries sustained by a prisoner did not implicate the Eighth Amendment:

> Many things – beating with a rubber truncheon, water torture, electric shock, incessant noise, reruns of "Space 1999" – may cause agony as they occur yet leave no enduring injury. The state is not free to inflict such pains without cause just so long as it is careful to leave no marks. Cf. *Lewis v. Lane*, 816 F.2d 1165, 1171 (7th Cir. 1987). The injury must be more than trifling – an allegation that a guard curled his lip at Williams without notice and an opportunity for a hearing would not state a claim, *see Bart v. Telford*, 667 F.2d 622, 625 (7th Cir. 1982) (*de minimis non curat lex* applies to constitutional torts as well as common law torts) – but Williams's injuries exceed that threshold.[24]

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[24] The beating at issue in *Williams* caused the prisoner headaches for weeks and left a scar. The prisoner was also

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Williams v. Boles, 841 F.2d 181, 183 (7th Cir. 1988) (Easterbrook, J.). The cases that have specifically addressed the issue are in accord with this fundamental principle, whether analyzing it under the Eighth Amendment or as a substantive due process claim.[25]

Most courts therefore treat the extent of injury as but one of the factors to be considered. "Even if the injuries suffered 'were not permanent or severe,' a plaintiff may still recover if 'the force used was unreasonable and excessive.' "[26] Indeed, other courts have upheld constitutional claims in which no physical injury was

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maced, which caused burning of the skin and eyes for ten hours. The restraints used in conjunction with the attack temporarily limited the mobility of the prisoner's fingers. *Id.* at 182.

[25] *Gray v. Spillman*, 925 F.2d 90, 93 (4th Cir. 1991) (rejecting serious injury requirement under Fifth and Fourteenth Amendments and construing *King v. Blankenship*, 636 F.2d 70, 72 (4th Cir. 1980) (prison case) as specifically rejecting a serious injury requirement); *McHenry v. Chadwick*, 896 F.2d 184, 187 (6th Cir. 1990); *Corselli v. Coughlin*, 842 F.2d 23, 26 (2d Cir. 1988); *Burton v. Livingston*, 791 F.2d 97, 100 (8th Cir. 1986); *Norris v. District of Columbia*, 737 F.2d 1148, 1151 (D.C.Cir. 1984). *See also H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1086 (11th Cir. 1986) (gratuitously slamming prisoner against wall, resulting in no permanent injuries); *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981) (display of revolver with threat to kill). *Cf. Brown v. Hughes*, 894 F.2d 1533, 1558 (11th Cir. 1990) ("Deliberately inflicted pain, as with an electric cattle prod, does not become unimportant and unactionable under the Eighth Amendment simply because the pain produced is only momentary.").

[26] *Corselli v. Coughlin*, 842 F.2d 23, 26 (2d Cir. 1988) (jury question was presented where prisoner was allegedly knocked unconscious and sustained cuts, swelling, dizziness and

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alleged, although most of them involved a serious threat to life or other extreme circumstances.[27]

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blurred vision). *See also Burgin v. Iowa Dept. of Corrections*, 923 F.2d 637 (8th Cir. 1991) (multiple abrasions and contusions and bloody nose, and a tender left clavicle); *Campbell v. Grammer*, 889 F.2d 797, 802 (8th Cir. 1989) (injuries from completely unjustified spraying with a fire hose were actionable even though not severe); *United States v. Bigham*, 812 F.2d 943, 949 (5th Cir. 1987) and cases cited in n.4 (severity of injury "tends to prove degree of force and the existence or absence of its justification"); *Byrd v. Clark*, 783 F.2d 1002, 1006 (11th Cir. 1986) (severity of injury is not determinative of constitutional violation but is probative of the amount of force used); *Johnson v. Doherty*, 713 F.Supp. 69, 71 (S.D.N.Y. 1989) (where injury is minor, "court must consider the context in which the incident occurred"); *Bowman v. Casler*, 622 F.Supp. 836, 838 (N.D.N.Y. 1985).

[27] *See, e.g., Jackson v. Crews*, 873 F.2d 1105, 1108 (8th Cir. 1989) (threat to break the plaintiff's neck could violate the Fourth Amendment); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (interrogation at gunpoint may deny due process); *Parrish v. Johnson*, 800 F.2d 600, 605, 611 (6th Cir. 1986) (verbal threats and waving of knife violated the Eighth Amendment; damages awarded); *Burton v. Livingston*, 791 F.2d 97, 100 (8th Cir. 1986) (death threat made at gunpoint by a prison guard was "a wanton act of cruelty which . . . was brutal despite the fact that it resulted in no measurable physical injury"); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) (dictum) (brandishing a cocked gun in a civilian's face would state a constitutional claim); *Black v. Stephens*, 662 F.2d 181, 189 (3d Cir. 1981) (damages awarded against officer who brandished a loaded gun at point-blank range); *Oses v. Fair*, 739 F.Supp. 707, 709-710 (D.Mass. 1990) (Eighth Amendment was violated when an officer struck prisoner on the head, stuck gun barrel into his mouth, and made him kiss the officer's wife's shoes); *Parker v. Asher*, 701 F.Supp. 192, 194-195 (D.Nev. 1988) (threatening a prisoner with a taser gun solely to inflict fear stated an Eighth

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When there is no need to use any force, the intentional infliction of even relatively minor injuries violates the Constitution.[28] In contrast, when the use of some

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Amendment claim); *Henson v. Thezan*, 698 F.Supp. 150, 152 (N.D.Ill. 1988) (photographs and medical records showing no injury did not require dismissal of a case in which the plaintiff alleged he was abused for hours); *Douglas v. Marino*, 684 F.Supp. 395, 398 (D.N.J. 1988) (similar to *Parrish*). *But see Wisniewski v. Kennard*, 901 F.2d 1276, 1277 (5th Cir. 1990) (putting a loaded revolver in the plaintiff's mouth and threatening to blow his head off did not inflict "significant" injury); *Hinojosa v. City of Terrell, Texas*, 834 F.2d 1223, 1230 (5th Cir. 1988) (pointing a loaded gun did not violate the Constitution); *see also Johnson v. Morel*, 876 F.2d 477, 480 n.1 (5th Cir. 1989) (*en banc*) (it is possible but "unlikely" that a nonphysical injury might constitute a "significant injury").

[28] *Oliver v. Collins*, 914 F.2d 56, 59 (5th Cir. 1990) (contusions, edema, lumps, and bruises stated a claim where the force was completely unprovoked); *Molton v. City of Cleveland*, 839 F.2d 240, 248-250 (6th Cir. 1988) (bruises, abrasions and a nosebleed stated a claim where an arrestee was knocked down and kicked while handcuffed); *Franklin v. Aycock*, 795 F.2d 1253, 1256-1258 (6th Cir. 1986) (damages awarded for "trauma and abrasions" to back, shoulder and ankle; no force was actually needed); *Harrison v. Byrd*, 765 F.2d 501, 504 (5th Cir. 1985) (bruises and knots were actionable where the plaintiff alleged he was repeatedly stomped while in handcuffs); *Simpson v. Saroff*, 741 F.Supp. 1073, 1078 (S.D.N.Y. 1990) (allegations of a punched stomach, swollen and bleeding wrists from tight handcuffs, and a faintly detectable scar on the wrist stated a Fourth Amendment claim); *Smallwood v. Renfro*, 708 F.Supp. 182, 188 (N.D.Ill. 1989) (no requirement of "serious injury" where force was used gratuitously; choking the plaintiff and hitting him in the arm with a radio for no reason stated an Eighth Amendment claim); *Zumbroegel v. City of Dearborn*

(Continued on following page)

force is justified, minor injuries that result do not violate the Eighth Amendment.[29] And if the defendants are reasonably responding to a major threat to safety or security, even crippling or life-threatening force may not be unconstitutional. *See Whitley, supra.*

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Heights, 705 F.Supp. 358, 363 (E.D.Mich. 1989) (slamming the plaintiff against a police car, handcuffing him too tightly, and striking him in the face after he had been handcuffed could violate the Constitution); *Bellamy v. McMickens*, 692 F.Supp. 205, 213 (S.D.N.Y. 1988) (where the plaintiff had broken some light fixtures but claimed he did not resist the officers and was beaten after he was handcuffed and sustained bruises and embedded glass fragments, officers were not entitled to summary judgment); *Brown v. Triche*, 660 F.Supp. 281, 284-287 (N.D.Ill. 1987) (swelling, abrasions, small laceration, loss of consciousness inflicted on a handcuffed prisoner who did not sit down when ordered violated the Constitution); *Burris v. Kirkpatrick*, 649 F.Supp. 740, 741, 745 (N.D.Ind. 1986) (damages awarded for a non-permanent burn where a guard threw hot water at another inmate and hit the plaintiff); *Williams v. Omodt*, 640 F.Supp. 120, 121-123 (D.Minn. 1986) (damages awarded for "bruises, contusions, swelling, and considerable pain" where there was no justification for any force); *Velleff v. Cantwell*, 630 F.Supp. 346, 347 (N.D.Ill. 1986) (infliction of lacerated lip and bruised eye and jaw by sheriff who hit the plaintiff in the face while two deputies held him raised a jury question).

[29] *White v. Roper*, 901 F.2d 1501, 1507 (9th Cir. 1990) (cut wrist and bruises not requiring medical treatment did not violate the Constitution where the plaintiff had resisted being placed in a cell); *Gassner v. City of Garland, Texas*, 864 F.2d 394, 400 n.11 (5th Cir. 1989) (scratches and bruises did not violate the Constitution where the plaintiff had resisted arrest); *Pressly v. Gregory*, 831 F.2d 514, 517-518 (4th Cir. 1987) (complaint of

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The court of appeals has expanded, through the back door, the circumstances in which correctional officers can abuse their power by using force when no force is necessary. This construction of the Eighth Amendment creates a gap in the coverage of the Amendment. Although this Court has repeatedly held that the Eighth Amendment prohibits the wanton and unnecessary infliction of pain, correctional officials, under the lower court's test, may now avoid liability for injuries, wantonly and unnecessarily inflicted, that are not visible or lasting, yet may be agonizingly painful.[30] Under the approach of the court of

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pain unverified by medical evidence did not support a constitutional claim where the plaintiff admitted he resisted handcuffing); *Bony v. Brandenburg*, 735 F.Supp. 913, 915 (S.D.Ind. 1990) (infliction of scrapes and scratches did not violate the Constitution where the plaintiff refused to leave his cell and had to be removed forcibly); *Brooks v. Pembroke City Jail*, 722 F.Supp. 1294, 1300 (E.D.N.C. 1989) (infliction of black eye did not violate the Constitution where prisoner resisted officers trying to put out a fire in his cell); *Francis v. Pike County, Ohio*, 708 F.Supp. 170, 171-172 (S.D.Ohio 1988) (contusions and abrasions on an arrestee who had refused to be handcuffed did not by themselves raise a factual issue as to excessive force).

[30] Establishing a "significant injury" threshold may also create a perverse incentive for prison personnel to avoid proper medical care and documentation of injuries, whether by keeping prisoners away from medical staff or by pressuring medical staff to minimize their documentation of injuries. *See, e.g., H.C. by Hewett v. Jarrard*, 786 F.2d at 1083 (beaten prisoner's requests for medical care delayed three days before he

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appeals, various kinds of torture have been placed beyond the pale of the Constitution.[31]

III. AN ISOLATED INCIDENT OF WANTON AND UNNECESSARY INFLICTION OF PAIN IS SUFFICIENT TO STATE AN EIGHTH AMENDMENT CLAIM

Petitioner anticipates that respondents may assert, as an alternative ground for affirming the decision of the court of appeals, that an isolated assault does not constitute "punishment" within the meaning of the Eighth Amendment.[32] This Court, however, has never required

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was transported to emergency room of local hospital from isolation cell). *Cf. Thomas v. City of New Orleans*, 687 F.2d 80, 82 (5th Cir. 1982) (testimony by former New Orleans Chief of Police that a "blue curtain" or code of silence exists on almost every major police force); *Bonsignore v. City of New York*, 521 F.Supp. 394, 398-99 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 635 (2d Cir. 1982) (unrebutted testimony as to the existence of a code of silence in the New York City Police Department). In this case, the petitioner testified that, following the beating, "he repeatedly sought medical attention but was refused." App. at 25.

[31] *See, e.g., Wisniewski v. Kennard*, 901 F.2d 1276, 1277 (5th Cir. 1990) (twice striking the prisoner and putting a loaded revolver in his mouth and threatening to blow his head off did not inflict significant injury).

[32] The respondents provide neither discussion of, nor authority for, this proposition in their brief opposing the petition for certiorari. The district court in this case specifically found that the beating was not an isolated incident. After the respondents finished beating petitioner, they came back and beat a second prisoner. App. at 27 n.1. The opinion of the court of appeals contains no discussion of this issue.

proof of something other than an isolated incident in prison Eighth Amendment cases.

In *Estelle v. Gamble*, an individual medical care case, the Court held that deliberate indifference to serious medical needs violates the Eighth Amendment whether manifested by prison doctors or by prison guards; it did not except "isolated" incidents and, indeed, cited with approval several cases in which Eighth Amendment violations were found resulting from a single incident.[33]

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[33] In *Estelle*, the Court held that no matter "how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." 429 U.S. at 105. This is the case "whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Id.* at 104-105. In *Estelle*, the Court cited several cases in which federal courts correctly found an Eighth Amendment violation based on a single incident. *Id.* at 104 n.10, citing *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974) (doctor's choice of the "easier and less efficacious treatment" of throwing away the prisoner's severed ear and stitching the stump may be attributable to "deliberate indifference . . . rather than an exercise of professional judgment"); *Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir. 1974), *cert. denied sub nom. Thomas v. Cannon*, 419 U.S. 879 (1974) (injection of penicillin with knowledge that prisoner was allergic, and refusal of doctor to treat allergic reaction); *Jones v. Lockhart*, 484 F.2d 1192 (8th Cir. 1973) (refusal of paramedic to provide treatment); and *Martinez v. Mancusi*, 443 F.2d 921 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (prison physician refuses to administer the prescribed pain killer and renders leg surgery unsuccessful by requiring prisoner to stand despite contrary instructions of surgeon).

Similarly, in *Whitley v. Albers*, the Court ruled that the shooting of one prisoner during the suppression of a prison riot was not actionable without a showing of malicious intent; but the Court made no suggestion that the apparent uniqueness of the incident in question played any part in its analysis.

Most recently, the Court has addressed the "isolated incident" question directly in *Wilson v. Seiter*, rejecting any distinction between acts directed at individual prisoners and conditions inflicted on groups of prisoners:

> It seems to us, however, that if an individual prisoner is deprived of needed medical treatment, that is a condition of *his* confinement, whether or not the deprivation is inflicted upon everyone else. Undoubtedly deprivations inflicted upon all prisoners are, as a policy matter, of greater concern than deprivations inflicted upon particular prisoners, but we see no basis whatever for saying that the one is a "condition of confinement" and the other is not – much less that the one constitutes "punishment" and the other does not.

59 U.S.L.W. at 4672 n.1. (Emphasis in original.)

For these reasons, respondents cannot successfully argue that isolated beatings do not violate the Eighth Amendment.[34] Indeed, the court of appeals below

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[34] The protections of the Cruel and Unusual Punishments Clause extend to each individual; and as *Wilson* makes clear, punishment that is inhumane when applied to ten or a hundred prisoners is no less inhumane when "isolated," that is, limited to one or two prisoners. Indeed, an isolated incident – i.e., one which significantly departs from the norm of prison

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apparently agrees that "isolated incidents" of guard brutality can violate the Eighth Amendment. In *Huguet v. Barnett*, 900 F.2d 838 (5th Cir. 1990), the case in which the Fifth Circuit first announced the "significant injury" test governing Eighth Amendment cases, there was stated no requirement that the injury result from a pattern or practice of brutality, although the facts of that case indicate that the alleged use of excessive force would properly be classified as an "isolated incident."[35] Similarly, in this case, although the issue of an "isolated incident" was specifically raised by the respondents, the court of appeals neither discussed nor decided the issue, suggesting that this is no longer relevant under the Eighth Amendment.

(Continued from previous page)

administration and discipline – is likely to be not only "unusual" in the literal sense but unsupported by any penological justification. The consequences of adopting an "isolated incident" limitation on the Eighth Amendment would be that no individual prison brutality case could ever be tried and decided without also trying and deciding the facts of some indeterminate number of other incidents.

[35] *See* p.5, *supra*.

IV. CONCLUSION

For the above reasons, petitioner urges this Court to reverse the court of appeals and reinstate the judgment of the district court in favor of petitioner.

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 90-6531

(6)

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In The

Supreme Court of the United States

October Term, 1991

KEITH HUDSON,

Petitioner,

versus

JACK MCMILLIAN, CSO II, MARVIN WOODS, CSO II, AND ARTHUR MEZO, LIEUTENANT,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Did the Fifth Circuit apply the correct legal test when determining that petitioner's claim that his Eighth Amendment rights under the Cruel and Unusual Punishment Clause were not violated as a result of a single incident of force by the respondents which did not cause a significant injury?[1]

---

[1] This Court's grant of a writ was expressly limited to that question. *See* This Court's order of April 29, 1991. Prisoner Hudson's brief at i attempts to change it to:

> Whether the court of appeals erred in holding that the Eighth Amendment cannot be violated by the beating of a prisoner by guards unless the beating results in significant injury, when it accepted the trial court's findings that respondents acted with malice, that they did not need to use any force against petitioner, and that the force inflicted unnecessary and wanton pain.

The United States in its amicus curiae brief at (I) attempts to change it to:

> Whether the court of appeals correctly determined that a beating by prison guards that "occasioned unnecessary and wanton infliction of pain," J.A. 32, did not constitute cruel and unusual punishment because the prisoner did not suffer "a significant injury," J.A. 33.

Prisoner Hudson's brief says at 30-33 that the issue of "single incident" is not before This Court in this case. The United States' brief says at 6-7 n.1 that the question whether the actions complained of constitute "punishment" within the meaning of the Eighth Amendment is not before This Court. The question accepted for review by This Court, however, as

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QUESTIONS PRESENTED – Continued

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opposed to those posed by Prisoner Hudson and by the United States in their briefs, expressly includes the question whether a single incident of force on a prisoner constitutes punishment under the Eighth Amendment. As stated in the brief of the United States at 7 n.1, "greater doctrinal clarity in this respect is of increasing practical importance in view of the substantial expansion in recent years in the number of cases of this sort." Because of the nature of the type of alleged conduct complained of by Prisoner Hudson the issue of whether the conduct constituted "punishment" within the meaning of the Eighth Amendment's Cruel and Unusual Punishment Clause is within This Court's grant of plenary review. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984), and *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 414 (1982).

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No. 90-6531

In The

Supreme Court of the United States

October Term, 1991

KEITH HUDSON,

Petitioner,

versus

JACK MCMILLIAN, CSO II, MARVIN WOODS, CSO II, AND ARTHUR MEZO, LIEUTENANT,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS

MAY IT PLEASE THE COURT:

The instant civil case is before This Court on a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. For reasons stated below, the respondents, Jack McMillian, Correctional Security Officer II, Marvin Woods, Correctional Security Officer II, and Arthur Mezo, Correctional Security Lieutenant, respectfully urge This Court to affirm the holding of the Fifth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Eighth Amendment to the Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

and § 1 of the Fourteenth Amendment, which reads in part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

and implicates certain laws of the State of Louisiana, including Article 2315 of the Louisiana Civil Code, which reads in part:

> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

and parts of the Louisiana Constitution (1974), which provide:

> [Right to Individual Dignity]. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime. [Article 1, § 3]
>
> [Freedom from Discrimination]. In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition. [Article 1, § 12]
>
> [Right to Humane Treatment]. No law shall subject any person . . . to torture, or to cruel, excessive, or unusual punishment. [Article 1, § 20, in pertinent part]

and of the following Louisiana Revised Statutes:

> Battery is the intentional use of force or violence upon another. . . . [Title 14, § 33, in pertinent part]
>
> Aggravated battery is a battery committed with a dangerous weapon. [Title 14, § 34, in pertinent part]
>
> Second degree battery is a battery committed without the consent of the victim when the offender intentionally inflicts serious bodily injury.
>
> For purposes of this article, serious bodily injury means bodily injury which involves unconsciousness, extreme physical pain, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death. [Title 14, § 34.1, in pertinent part]
>
> Simple battery is a battery committed without the consent of the victim. [Title 14, § 35, in pertinent part]
>
> Assault is an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery. [Title 14, § 36]
>
> Aggravated assault is an assault committed with a dangerous weapon. [Title 14, § 37, in pertinent part]

Simple assault is an assault committed without a dangerous weapon. [Title 14, § 38, in pertinent part]

Negligent injury is the inflicting of any injury upon the person of another by criminal negligence. [Title 14, § 39, in pertinent part]

Persons committed to the institutional care of the [Department of Corrections] shall be treated in a humane manner. . . . [Title 15, § 828, in pertinent part]

STATEMENT OF THE CASE

The petitioner, Keith Hudson (Prisoner Hudson), was at the time of the incident and still is a prisoner of the State of Louisiana, confined at Louisiana State Penitentiary (L.S.P.)[2] for an armed robbery conviction (Tr. 76).[3] He filed suit pro se in the United States District Court for the Middle District of Louisiana *in forma pauperis* under 28 U.S.C. § 1915. Prisoner Hudson presumably brought suit under 42 U.S.C. § 1983 against the respondents, Jack McMillian, Corrections Security Officer II (CSO McMillian), Marvin Woods, CSO II (CSO Woods),

[2] L.S.P. is Louisiana's maximum-security prison housing the State's most violent and disruptive prisoners, and is also this country's largest maximum-security prison. *See Thorne v. Jones*, 585 F. Supp. 910, 912 (M.D. La. 1984), *rev'd in part*, 765 F.2d 1270, 1271 (5th Cir. 1985), *writ denied*, 475 U.S. 1016 (1986). Camp J, the camp at L.S.P. in which Prisoner Hudson was housed, is L.S.P.'s disciplinary camp housing L.S.P.'s most disruptive prisoners in single-cell confinement (Tr. 97-98).

[3] References to the Trial Transcript will be "Tr.___" and references to the Joint Appendix will be "J.A.___".

and Arthur Mezo, Lieutenant (Lt. Mezo), all state corrections security officers. The complaint alleged violations of the Constitution as the result of an incident on October 30, 1983, at Camp J of L.S.P. Prisoner Hudson prayed for injunctive relief and retrospective damages in the amount of $50,000 for physical, mental, and emotional anguish because of an alleged unjust and unnecessary beating (J.A. 2-8).

With the parties' consent under 28 U.S.C. § 636(c), the case was tried before a magistrate on March 10, 1987. The magistrate found in favor of Prisoner Hudson on his Eighth Amendment claim of excessive force, and against CSO McMillian, CSO Woods, and Lt. Mezo, awarding Prisoner Hudson $800 in retrospective money damages, but dismissing all other claims. The opinion of the District Court is unreported (J.A. 19-29).

CSO McMillian, CSO Woods, and Lt. Mezo appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit vacated the judgment of the District Court because Prisoner Hudson had not proved a "significant injury" (J.A. 30-33). The opinion of the Fifth Circuit is now reported at 929 F.2d 1014. Prisoner Hudson pro se filed a petition for a writ of certiorari, which This Court granted. This Court later appointed counsel for Prisoner Hudson and set out the specific question to be reviewed.

At the trial on the merits, in Prisoner Hudson's case-in-chief, Prisoner Hudson, along with fellow prisoners Edward Allen and Earl Truvia, testified (Tr. 11-84). Testifying in the case-in-chief of CSO's McMillian and Woods and Lt. Mezo were CSO Woods, Correctional Security Captain Jimmy Cole, Correctional Security Lieutenant

Gary Dubroc, and Medical Technician David Lemoine (Tr. 88-137). CSO's McMillian and Woods and Lt. Mezo introduced six exhibits during the trial on the merits (J.A. 9-18), and moved at the appropriate times for dismissal of Prisoner Hudson's suit (Tr. 85-87, 139-40, 145-47). Prisoner Hudson called Medical Technician Lemoine and Captain Cole in his case-in-rebuttal (Tr. 140-45).

Following a review of the evidence (J.A. 20-26), the District Court made the following findings of fact:

> Based on the credibility of the witnesses, the contemporaneous complaint to Kelone (Exhibit D-1), the sick call sheet (Exhibit D-5) and the testimony of the plaintiff, Allen and Truvia, the court finds that defendants Woods and McMillian used force on the plaintiff when there was no need to use any force at all, and that Mezo expressly condoned the use of force in this instance.
>
> The court further finds that the force used resulted in minor bruises and swelling to the plaintiff's face, mouth and lip, and also damaged his partial plate sufficiently to make it unwearable for three to four months. During this time the plaintiff suffered no harm or medically adverse consequences due to the broken plate.
>
> Plaintiff's injuries from the beating were minor and required no medical attention. They healed naturally without medical intervention. Plaintiff was seen by a medical specialist two days after the incident who observed no serious injuries and who felt no treatment was necessary. [J.A. 26]

The District Court, based on its review of applicable law, dismissed all of Prisoner Hudson's Constitutional

claims (J.A. 28), except his Eighth Amendment cruel and unusual punishment claim arising out of the allegations that CSO's McMillian and Woods in the early morning hours of October 30, 1983, while escorting Prisoner Hudson in full restraints from his single-man cell on Cuda-1-right to Administrative Lockdown, both in Camp J, hit and kicked Prisoner Hudson while Lt. Mezo watched. Under this Constitutional claim the District Court, in accepting the allegations of Prisoner Hudson and his witnesses, determined as a matter of law that:

> Here there was no need to use any force since the plaintiff was already in restraints. Since the plaintiff was harmed, the only explanation for it is the unnecessary use of force by Woods and McMillian. Mezo did not actually strike the plaintiff, but the credible testimony is that he was present, and in a position to stop Woods and McMillian, but instead acted only to temper their actions. This was an explicit approval of at least a limited beating. The defendants' conduct can only be seen as motivated by malice. All the defendants, by their acts of commission and omission, violated the plaintiff's rights under the Eighth Amendment by the use of unnecessary and excessive force. [J.A. 27-28]

The trial court determined that Prisoner Hudson had established that he had sustained only minor injuries resulting from the conduct of CSO's McMillian and Woods and Lt. Mezo, and the District Court awarded Prisoner Hudson $800.00 to compensate for his injuries (J.A. 28-29).

CSO's McMillian and Woods and Lt. Mezo appealed the judgment to the Fifth Circuit raising as errors the following:

1. Whether the District Court erred in holding appellee-inmate Hudson and his inmate witnesses were more credible than the defendants and their witnesses, and documented exhibits?

2. Whether the District Court erred in holding that defendants violated appellee's constitutional rights where the evidence establish[ed] at most that appellee was complaining of single isolated incident, and the evidence establish[ed] that such action, even if it happened, would not be authorized by prison officials for a penal or disciplinary purpose, and appellee had adequate remedy at State law?[4]

See the brief of CSO's McMillian and Woods and Lt. Mezo in the Fifth Circuit at vii.

The Fifth Circuit determined as a matter of fact that:

> The evidence reflects that on October 30, 1983 Hudson got into an argument with McMillian who punched Hudson in the mouth, eyes, chest and stomach while Woods held him. The blows cracked Hudson's partial dental plate, split his lower lip and loosened his teeth. He received bruises to his body but no other cuts. Woods kicked Hudson on his backside. Mezo, the supervisor of McMillian and Woods, watched the beating but merely cautioned the officers not to "have too much fun." [J.A. 31]

In applying the facts as found by the District Court to the Fifth Circuit's legal standard as set out in *Huguet v. Barnett*, 900 F.2d 838 (5th Cir. 1990), for Eighth Amendment claims arising out of allegations of use of excessive

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[4] CSO's McMillian and Woods and Lt. Mezo moved for involuntary dismissal in the District Court on the same grounds (Tr. 85-87, 139-40, and 145-47).

and unnecessary force on prisoners by correctional officers, the Fifth Circuit reversed the judgment of the District Court. Under that legal standard, the Fifth Circuit looks for the following factors in order to determine whether the Eighth Amendment's Cruel and Unusual Punishment Clause has been violated:

1. a significant injury, which
2. resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was
3. objectively unreasonable, and
4. the action constituted an unnecessary and wanton infliction of pain. [J.A. 32]

Under this legal standard the Fifth Circuit concluded that, based on the fact findings of the District Court, Prisoner Hudson's injuries were not sufficient to meet the "significant injury" factor of their legal standard for this kind of Eighth Amendment claim (J.A. 32-33).

The judgment of the Fifth Circuit was entered on July 31, 1990. Following the denial of a timely petition for rehearing, Prisoner Hudson filed a petition for a writ of certiorari with This Court. On April 15, 1991, This Court granted Prisoner Hudson's petition with leave to proceed *in forma pauperis*. This Court on April 29, 1991, appointed counsel for Prisoner Hudson and amended its order of April 15, 1991, by setting out a specific question for review.

CSO's McMillian and Woods and Lt. Mezo, through their counsel, accept that they are now saddled with the findings of fact by the District Court and the approval of those factual findings by the Fifth Circuit. *See Anderson v.*

City of Bessemer City, 470 U.S. 564, 575 (1985). The reason that CSO's McMillian and Woods presented at trial no justification for their alleged use of physical force on Prisoner Hudson, and that Lt. Mezo presented no reason for his not stopping the alleged use of force, was not because there was no justification, but rather because they denied that any force was used on Prisoner Hudson at all (J.A. 25). CSO's McMillian and Woods and Lt. Mezo, through their counsel, still deny that force was used on Prisoner Hudson during the early hours of October 30, 1983.[5]

It is also clear from the record in this case that the State of Louisiana and the prison administration at L.S.P.

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[5] The record in this case is replete with contradictions in regard to evidence presented by Prisoner Hudson that he was hit nine to ten times by CSO McMillian while being held by CSO Woods in the walkway between Cuda 1-2 and Cuda 3-4, or that CSO Woods kicked him in the rear while Lt. Mezo told them not to "have too much fun." For example, Prisoner Truvia, who testified to hearing the beating, was not even housed in the Cuda Unit (Tr. 49). Prisoner Allen could only testify that he thought he heard "licks being passed." Prisoner Allen testified, however, that he heard a beating that he claims occurred in the lobby of Cuda 1 (Tr. 32). Prisoner Hudson claims that the beating took place in the walkway between Cuda 1-2 and Cuda 3-4 (Tr. 57). While Exhibit D-5 indicates that Prisoner Hudson had a dental complaint on November 1, 1983, J.A. 5, Medical Technician Lemoine testified that Prisoner Hudson had made dental complaints for several months prior to October 30, 1983, and had received an appointment to see a dentist prior to November 1, 1983 (Tr. 128-29). The statements contained in Exhibit D-5, J.A. 9, conflict with Prisoner Hudson's allegations in his complaint, J.A. 5-7, and his testimony at trial (Tr. 55-84).

do not condone nor tolerate the type of conduct complained of by Prisoner Hudson (J.A. 23; Tr. 90 & 95-96). It is equally clear that CSO's McMillian and Woods and Lt. Mezo do not make prison policy but have authority only to carry it out. CSO's McMillian and Woods and Lt. Mezo are line officers and not high-ranking prison officials at L.S.P.[6] (J.A. 9-10, 13-14 & 16-18; the Major at Camp J was Davy Kelone). The alleged conduct that occurred between Prisoner Hudson and CSO's McMillian and Woods and Lt. Mezo can be characterized as a personal dispute.[7]

The parties before This Court, including those appearing as amici curiae, must accept the findings of fact in the courts below. CSO's McMillian and Woods and Lt. Mezo assert, through their counsel, that just as the lower court's fact finding of an incident is binding on them, the fact-finding that Prisoner Hudson suffered only "minor injuries" is binding on Prisoner Hudson. The injury found by the District Court as a matter of fact was "minor bruises and swelling to the plaintiff's face, mouth

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[6] Contrary to the unsupported assertion of the Solicitor General, see the amicus curiae brief of the Solicitor General at 7 n.1., Lt. Mezo does not possess the authority to mete out punishment on behalf of the State of Louisiana or L.S.P. In fact, even Prisoner Hudson admits that the action or inaction was contrary to L.S.P.'s policy and practice (Tr. 62).

[7] Just prior to the use of physical force, CSO's McMillian and Woods and Lt. Mezo had had a heated verbal exchange with Prisoner Hudson (Tr. 55-56; J.A. 11-12 & 20-21). CSO's McMillian and Woods and Lt. Mezo once again, however, deny that they used any physical force on Prisoner Hudson in the early morning hours of October 30, 1983.

and lip, and also damag[e to] his partial [dental] plate."[8] No medical treatment was necessary and no other adverse consequences occurred (J.A. 26). Under the law as applied to these findings of fact the Fifth Circuit determined that a significant injury had not been inflicted (J.A. 31-33).

SUMMARY OF ARGUMENT

When a prisoner complains of his conditions of confinement, a court must look first to the primary source of constitutional protection, the Eighth Amendment's Cruel and Unusual Punishment Clause. If relief is not afforded under that clause, a prisoner may have a remedy under the Fourteenth Amendment's substantive due process, but only in the absence of adequate state relief.

The Eighth Amendment's Cruel and Unusual Punishment Clause has two standards, one for challenges to sentences and one for challenges to conditions of confinement. The standard for a challenge to conditions of confinement, as in this case, has separate objective and subjective components. The objective component asks whether the deprivation is sufficiently serious to warrant Eighth Amendment protection, and the subjective component inquires into the prison official's state of mind. It is the objective component alone that is at issue in this case.

[8] The damage to Prisoner Hudson's partial dental plate is damage to property and not to the person, and will not hereinafter be considered as part of the physical injuries received.

Prisoner Hudson's claim does not properly fall under the Eighth Amendment because it is not "punishment." Instead it is essentially a personal dispute between a prisoner and lower-ranking correctional personnel. If it does fall under the Eighth Amendment, the Fifth Circuit's significant-injury standard provides for the objective component in a fair, practical, and constitutional fashion that is consistent with This Court's interpretation of the Eighth Amendment.

Prisoner Hudson may have had a claim under the Fourteenth Amendment. Because Louisiana provides for both pre-deprivation prohibitions and adequate post-deprivation remedies, the Due Process Clause has not been violated.

ARGUMENT

I. THE CONSTITUTIONAL FRAMEWORK

This case involves a claim by a state prisoner that state correctional security officers used unnecessary and excessive force. The courts below treated Prisoner Hudson's claim of unnecessary and excessive physical force solely under the Eighth Amendment's Cruel and Unusual Punishment Clause. The constitutional framework, however, may not be quite so simple.

A. THE EIGHTH AMENDMENT HAS DIFFERENT STANDARDS FOR CHALLENGES TO SENTENCES AND CHALLENGES TO CONDITIONS OF CONFINEMENT

The instant case presents This Court with the question of the proper legal standard to be applied under the

Eighth Amendment to an alleged single incident of force in a prison setting. It is this question that CSO's Jack McMillian, Marvin Woods, and Lt. Mezo will treat in this brief.[9]

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[9] The question accepted for review by This Court, as opposed to those posed by Prisoner Hudson and the United States in their briefs, encompasses the issue of whether a single incident of force on a prisoner constitutes punishment under the Eighth Amendment. Because single incident is in the question for review, it is also clearly before This Court. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1988). In fact, Prisoner Hudson's brief at 34-37 deals directly with the issue of a single incident.

Suits brought by a state prisoner pro se under 42 U.S.C. § 1983 for alleged constitutional deprivations by prison employees have increased dramatically over recent years. These cases, like the instant suit, do not involve prison practice or policy, but rather alleged actions by line personnel which if true are a violation of prison practices and policies, as well as of state law.

In fact it is precisely that issue that Prisoner Hudson's brief, the amicus curiae brief of Americans for Effective Law Enforcement, Inc., and the amicus curiae brief of Prisoners' Legal Service of New York deal with at length. It is the contentions in these briefs that if the Fifth Circuit's legal standard is adopted in this type of Eighth Amendment challenge, then prison officials will have no way of forcing their employees to operate within the rules established by the prison officials. According to these briefs, absent federal court intervention under the Eighth Amendment's Cruel and Unusual Punishment Clause, prison officials will have no means through which to prevent their employees from engaging in unauthorized acts of physical force on state prisoners. *See* Amicus Curiae brief of Americans for Effective Law Enforcement, Inc. at 4-5 and amicus curiae of Prisoner's Legal Services of New York at 19-25.

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This Court has determined that the purpose of the Eighth Amendment's Cruel and Unusual Punishment Clause is to "limit the power of those entrusted with the criminal law function of government." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). In other words, the Eighth Amendment prohibits the infliction, by the various

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A total of 214,308 suits classified as private civil-rights litigation were filed in federal courts from June 30, 1985, through 1989. Of this number 112,748 were filed by non-prisoners, while 101,415 were filed by prisoners. Prisoner suits during this period amounted to 47% of the total number of this type of filing. During this same period nonprisoner filings decreased by 1,413, while prisoner filings increased by 3,064. In 1985 prisoner filings composed 44% of these types of filings. In 1989 prisoner suits rose to 50% of this type of filing. *See Annual Report of the Director of the Administrative Office of the United States Courts* (1989) at 118, Table S-12. Based on those statistics the Solicitor General correctly asserts that "greater doctrinal clarity in this respect is of increasing practical importance in view of the substantial expansion in recent years in the number of cases of this sort."

These types of suits generally do not involve a challenge to the conditions of confinement imposed by state prison officials but rather an allegation that particular prison employees are not following the policies imposed on those prison employees by prison officials. The instant case presents just such a situation. The single unauthorized event by line security officers was raised as a defense in the District Court (Tr. 85-87, 139-40 and 145-47), and as error in the Fifth Circuit. *See* the brief of CSO's McMillian and Wood and Lt. Mezo in the Fifth Circuit at IV and 11-14. These are grounds for affirmance of the decision of the Fifth Circuit. It can be therefore considered by This Court. *See, United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977) cited in *Whitley v. Albers*, 475 U.S. 313, 326 (1986).

governments in this country, of cruel and unusual punishments on convicted persons. *Wilson v. Seiter*, 111 S.Ct. 2321, 2323 (1991). The majority of This Court's decisions interpreting the prohibition against cruel and unusual punishment have examined the constitutionality of sentences imposed by courts.

This Court has also applied the Eighth Amendment's Cruel and Unusual Punishment Clause to "deprivations that were not specifically part of the sentence but were suffered during imprisonment" as a condition of confinement. *Id.*, 111 S.Ct. at 2323. As indicated by This Court, cases involving a criminal sentence imposed, and cases arising out of conditions of confinement, cannot be subjected to the same analysis under the Eighth Amendment's Cruel and Unusual Punishment Clause. *Id.*, 111 S.Ct. at 2326.[10] This case does

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[10] Examples of cases involving challenges under the Eighth Amendment to sentences imposed include *Weems v. United States*, 217 U.S. 349 (1910) (imposing a long prison sentence); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (subjecting a prisoner to the penalty of attempted execution more than once); *Trop v. Dulles*, 356 U.S. 86 (1958) (imposition of a sentence of deprivation of citizenship); *Robinson v. California*, 370 U.S. 660 (1962) (imposing a criminal sentence for being addicted to drugs); and *Gregg v. Georgia*, 428 U.S. 153 (1976) (involving the imposing of the death penalty). Examples of cases involving challenges under the Eighth Amendment to conditions of confinement include *Estelle v. Gamble*, 429 U.S. 97 (1976) (denial of medical care for serious medical needs); *Rhodes v. Chapman*, 452 U.S. 337 (1981) (double-celling of prisoners); *Whitley v. Albers*, 475 U.S. 312 (1986) (orders by a high-ranking prison official to use deadly physical force to quell a riot); and *Wilson v. Seiter*, 111 S.Ct. 2321 (1991) (general conditions of confinement). These two types of challenges are not and cannot be subjected to the same legal standard under the Cruel and Unusual Punishment Clause. *Id.* 111 S.Ct. at 2323-25.

not involve an Eighth Amendment challenge to a sentence imposed by a court but rather a challenge to a condition of confinement.

Cases lodging challenges of cruel and unusual punishment to a criminal sentence never raise the questions of "Is it punishment?" or "Who is responsible?" Imposing a criminal sentence is always punishment within the meaning of the Eighth Amendment, and the entity that is responsible for the cruel and unusual punishment under this type of challenge is always the government that imposed the sentence.

Challenges to conditions of confinement, however, always raise the questions of "Is it punishment?" and "Who is responsible?" In conditions-of-confinement cases, "The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Whitley v. Albers*, 475 U.S. 312, 320 (1986). The "kind of conduct" clearly involves not only "What occurred?" but "Who caused it?" For example, while deliberate indifference to a prisoner's serious medica' needs may constitute the "kind of conduct" proscribed by the Eighth Amendment's Cruel and Unusual Punishment Clause, *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), who is responsible for that "kind of conduct" must also be determined in order to find an Eighth Amendment violation. *See, e.g., West v. Atkins*, 487 U.S. 42, 58 (1988) (Scalia, J., concurring) ("I do not believe that a doctor who lacks supervisory or other penological duties can inflict punishment within the meaning of that term in the Eighth Amendment").

Authorization of the use of force on a prisoner by a high-ranking prison official may constitute the "kind of conduct" proscribed by the Eighth Amendment's Cruel and Unusual Punishment Clause, *Whitley v. Albers*, 475 U.S. 312, but an isolated assault by a corrections security officer is probably not the "kind of conduct" that falls within the meaning of "punishment" in the Eighth Amendment. *See George v. Evans*, 633 F.2d 413, 415 (5th Cir. 1980) ("An isolated assault by an individual guard on an inmate is not within the meaning of the Eighth Amendment, punishment."); *Johnson v. Glick*, 481 F.2d 1028, 1032 (2nd Cir.) ("[A]lthough a spontaneous attack by a guard is 'cruel' and we hope 'unusual,' it does not fit any ordinary concept of 'punishment.' "), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973); *cf. Graham v. Connor*, 490 U.S. 386, 392 n.6 (1989) (This Court noted the issue of whether such conduct is punishment); *but see, e.g., Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) ("If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment, and 'cruel and unusual' because the Supreme Court has interpreted the term to forbid unauthorized . . . punishments."), *cert. denied*, 479 U.S. 816 (1986). In conditions-of-confinement challenges the questions of "Is it punishment?" and "Who is responsible?" must always be answered before a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause can be found.[11]

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[11] This conclusion is implicit in This Court's ruling in *Wilson v. Seiter*, 111 S.Ct. 2321. It is impossible to determine a culpable state of mind without first determining who is responsible for the conduct.

B. IN EIGHTH AMENDMENT CHALLENGES TO CONDITIONS OF CONFINEMENT, THIS COURT REQUIRES BOTH OBJECTIVE AND SUBJECTIVE COMPONENTS.

It is now clear that, in challenging conditions of confinement under the Eighth Amendment's Cruel and Unusual Punishment Clause, the prisoner must prove the existence of both an objective and a subjective component before he can prevail.[12] The objective component inquires into the question of "Was the deprivation sufficiently serious?" while the subjective component inquires into the question of "Did the prison official act with a sufficiently culpable state of mind?" Both the objective and subjective components must be proved by the prisoner in order to prevail on an Eighth Amendment Cruel and Unusual Punishment claim arising out of the conditions of confinement. *See Wilson v. Seiter*, 111 S.Ct. at 2324.

The objective and subjective components are separate and distinct tests. Each component answers a separate

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[12] The standard established by the Fifth Circuit in *Huguet v. Barnett*, 900 F.2d 838, 841 (5th Cir. 1990) (decided on May 11, 1990), and applied in the instant case, *Hudson v. McMillian*, 929 F.2d 1014, 1015 (5th Cir. 1990) (decided on July 31, 1990), predates the legal standard set out by This Court in *Wilson v. Seiter*, 111 S.Ct. 2321 (decided on June 17, 1991). The legal standard set out by the Fifth Circuit for this type of Eighth Amendment challenge clearly includes distinct and separate objective and subjective components. The standard as set out by the Fifth Circuit in *Huguet* makes the objective component the threshold inquiry followed by an inquiry into the subjective component. Prisoner Hudson's claim was dismissed because he did not meet the threshold inquiry into the objective component (J.A. 32-33).

and distinct inquiry. The objective component determines whether the deprivation complained of is sufficiently serious to warrant protection under the Eighth Amendment's Cruel and Unusual Punishment Clause. The subjective component examines the state of mind of the prison official. *Id.*

The instant case does not present a dispute over the subjective component of the legal standard,[13] but over the

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[13] The subjective component is satisfied by a finding of wantonness, and the degree of wantonness is determined by the circumstances. If the circumstances require that the "actions are necessarily taken 'in haste, under pressure,' and balanced against 'competing institutional concerns for the safety of prison staff or other inmates,' " then the culpable state of mind is that of "acting 'maliciously and sadistically for the very purpose of causing harm,' " *Wilson v. Seiter*, 111 S.Ct. at 2326, citing *Whitley v. Albers*, 475 U.S. at 320-21. *See also Dudley v. Stubbs*, 489 U.S. 1034, 1037-38 (1989) (O'Connor, J., dissenting from denial of certiorari). However, when no balancing of important governmental responsibilities exists, the culpable state of mind is that of "deliberate indifference." *Wilson v. Seiter*, 111 S. Ct. at 2326, *citing Whitley v. Albers*, 475 U.S. at 320, and *Estelle v. Gamble*, 429 U.S. at 97. Currently those are the two degrees of wantonness that satisfy the subjective component.

In this case both the District Court, J.A. 28, and the Fifth Circuit, J.A. 32, determined that CSO McMillian, CSO Woods, and Lt. Mezo acted maliciously and sadistically. The subjective component is therefore not at issue. CSO's McMillian and Woods and Lt. Mezo again deny that they used any force on Prisoner Hudson, but acknowledge that, given the findings of fact by the District Court, the subjective component has been met.

It is possible that the "deliberate indifference" as opposed to the "malicious and sadistic" standard should be applied to

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objective component. The dispute is whether the result of the conduct complained of is "harmful enough to satisfy the objective component of an Eighth Amendment claim." *See id.*, 111 S.Ct. at 2326, citing *Whitley v. Albers*, 475 U.S. at 312, and *Rhodes v. Chapman*, 452 U.S. 337 (1981).

The objective component is the threshold inquiry in all challenges to conditions of confinement under the Eighth Amendment's Cruel and Unusual Punishment Clause. *Wilson v. Seiter*, 111 S.Ct. at 2328. In This Court the objective component has always required some form or degree of injury to the prisoner. In *Estelle v. Gamble*, for example, This Court required that a "serious medical need" exist before an Eighth Amendment claim could be raised. In *Whitley v. Albers*, a serious physical injury resulted from the use of authorized physical force. In *Wilson v. Seiter* and *Rhodes v. Chapman*, a deprivation of a necessity of life had to exist.[14]

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the type of conduct at issue in this case since no balancing of important governmental responsibilities existed. Prisoner Hudson concedes in his brief at 10 n.6, however, that the "malicious and sadistic" state of mind standard of *Whitley* rather than the "deliberate indifference" state of mind standard of *Estelle* applies to the instant case.

[14] It is not enough to deprive a prisoner of medical care; the deprivation of medical care must be directly linked to a *serious* medical need. *Estelle v. Gamble*, 429 U.S. at 104. Nor is it enough to deprive a prisoner of comfortable living conditions; the living conditions must cause a deprivation of life's necessities. *Wilson v. Seiter*, 111 S.Ct. at 2327, and *Rhodes v. Chapman*, 452 U.S. at 346.

In asserting that the degree of resulting injury is not a factor to be considered under an Eighth Amendment claim, Prisoner Hudson relies on decisions in which a sentence was challenged or in which This Court disapproved of a requirement of injury under the *subjective* component in challenges to conditions of confinement; he does not cite decisions addressing the injury requirement under the objective component of a challenge to a condition of confinement.[15] The use of the rationale from a sentencing case in a conditions-of-confinement case has been expressly disapproved by This Court. *Wilson v. Seiter*, 111 S.Ct. at 2326. In a condition-of-confinement case an injury standard is relevant to the objective component but not to the subjective.[16]

Under the objective component, the degree of injury is a major factor when the conduct complained of involves the use of physical force. In *Whitley*, for example, the injury that resulted was clearly serious since it involved shotgun blasts to the legs of a prisoner. *Whitley v. Albers*, 475 U.S. at 316. In fact, despite the protestations in his brief, Prisoner Hudson concedes that some level of physical injury to a prisoner is required in order to pass the threshold inquiry under the objective component in an Eighth Amendment challenge to conditions of confinement under the Cruel and Unusual Punishment Clause.[17]

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[15] Prisoner Hudson's brief at 9-25.

[16] As the subjective component deals with the state of mind of the actor, the amount of injury resulting does not matter. *See Wilson v. Seiter*, 111 S.Ct. at 2327-28.

[17] Prisoner Hudson agrees in his brief at 27 that not every "push or shove" states an Eighth Amendment claim. The

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This Court has made it clear in *Wilson v. Seiter* that the legal standard applied in a prisoner's challenge to conditions of confinement under the Eighth Amendment must contain separate and distinct objective and subjective components, *Wilson v. Seiter*, 111 S.Ct. at 2323-27. The Fifth Circuit's legal standard under challenge here provides for separate and distinct objective and subjective components.

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disagreement is over the extent of the injury, resulting from the "push or shove," that is needed to state an Eighth Amendment claim. The Solicitor General also concedes in his amicus curiae brief at 9-11 that the extent of the injury resulting from the "push or shove" must be a factor in these types of cases.

What both Prisoner Hudson and the Solicitor General ignore is that This Court has in *Wilson v. Seiter* established a threshold objective component that inquires into the seriousness of the deprivation. Both Prisoner Hudson and the Solicitor General are in effect requesting that This Court reverse itself in this case by eliminating the objective component. An earlier attempt by the Solicitor General and counsel for Prisoner Hudson to have This Court eliminate the subjective component was rejected in *Wilson v. Seiter*, 111 S.Ct. 2321. Their attempt in this case to have This Court eliminate the objective component should also be soundly rejected, particularly as both counsel for Prisoner Hudson and the Solicitor General have conceded that some degree of injury should be required. Prisoner Hudson was simply unable to prove that his physicial injuries were significant (J.A. 26, 28-29 & 30-31).

C. A PRISONER WHO DOES NOT HAVE AN EIGHTH AMENDMENT CLAIM MAY HAVE A FOURTEENTH AMENDMENT DUE PROCESS CLAIM.

This Court has recently stated that when a prisoner challenges his conditions of confinement "the primary source of substantive protection" under the Constitution is the Eighth Amendment's Cruel and Unusual Punishment Clause. *Whitley v. Albers*, 475 U.S. at 327. Such claims, however, may also state a violation of substantive due process under the Fourteenth Amendment. *See Graham v. Connor*, 490 U.S. at 395 n.10, citing *Whitley v. Albers*, 475 U.S. at 327.[18] When the state has pre-deprivation proscriptions against such conduct and adequate post-deprivation remedies for engaging in such conduct, a violation of the Due Process Clause does not occur. If the state does not provide pre-deprivation guidelines and adequate post-deprivation remedies, however, intentional misconduct by its employees may be remedied under the Due Process Clause of the Fourteenth Amendment.[19]

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[18] Substantive due process affords free citizens, pretrial detainees, and convicted felons protection from excessive force by agents of the government who are acting on behalf of the government. *See Graham v. Connor*, 490 U.S. at 395 n.10. Just as the Due Process Clause of the Fourteenth Amendment protects public-school children from excessive force by school personnel, *Ingraham v. Wright*, 430 U.S. 651, 672-82 (1977), substantive due process protects a prisoner from being subjected to an intentional infliction of bodily injury by prison employees. *See Daniels v. Williams*, 474 U.S. 327 (1986), and *Davidson v. Cannon*, 474 U.S. 344 (1986).

[19] This is clearly the lesson to be learned in *Ingraham v. Wright*, 430 U.S. at 672-82. This principle is also made clear

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Therefore, if Prisoner Hudson does not have a claim under the Eighth Amendment's Cruel and Unusual Punishment Clause arising out of this alleged single and unauthorized use of physical force by CSO McMillian, CSO Woods, and Lt. Mezo, he may have had a claim under the Due Process Clause of the Fourteenth Amendment, which provides prisoners with constitutional protection from injuries intentionally inflicted upon them by prison employees.[20] The application of this Eighth

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through a reading of *Parratt v. Taylor*, 451 U.S. 527 (1981), *Hudson v. Palmer*, 468 U.S. 517 (1984), *Davidson v. Cannon*, 474 U.S. 344 (1986), and *Daniels v. Williams*, 474 U.S. 327 (1986).

[20] While the legal standard under the Eighth Amendment's Cruel and Unusual Punishment Clause and substantive due process under the Fourteenth Amendment's Due Process Clause are redundant, *Whitley v. Albers*, 475 U.S. at 327, they are not identical. The Eighth Amendment is the primary source but not the exclusive constitutional remedy. The distinction appears to be that the Eighth Amendment prohibits punishments, while the Fourteenth Amendment prohibits intentional deprivations that are without due process of law. Thus Prisoner Hudson's lament in his brief, that approval of the Fifth Circuit's legal standard under this type of Eighth Amendment case would leave prison personnel free to inflict all kinds of pain without injury, is baseless. The prisoner may resort to the Due Process Clause if the state does not provide pre-deprivation proscriptions or guidelines and adequate post-deprivation remedies.

While this ground for affirmance is not properly within the question posed by This Court, it was raised in the District Court and in the Court of Appeal. *See* the brief of CSO's McMillian and Woods and Lt. Mezo in the Fifth Circuit at vii and 11-14. This ground may therefore be considered as a basis for affirming the decision of the Fifth Circuit. *See United States*

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Amendment framework to Prisoner Hudson's claim that CSO's McMillian and Woods and Lt. Mezo used unauthorized excessive physical force on him in violation of his constitutional rights leads to the conclusion that the opinion of the Fifth Circuit should be affirmed.

II. THE FIFTH CIRCUIT'S LEGAL STANDARD IS CONSTITUTIONAL

The conduct complained of by Prisoner Hudson is that CSO McMillian and CSO Woods in the early morning hours of October 30, 1983, used unauthorized and unjustified physical force on him while he was being moved in full restraints from one single-man cell to another, and that Lt. Mezo not only did nothing to stop the unauthorized and unjustified use of physical force, but in fact, encouraged it. As a result of the use of unauthorized and unjustified physical force Prisoner Hudson received a fat lip and other minor bruises (J.A.26 and 31-33).[21] It is with this kind of conduct in mind that This Court must review the legal standard that the Fifth Circuit applied to Prisoner Hudson's challenge to his condition of confinement under the Eighth Amendment's

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v. New York Telephone Co., 434 U.S. 159, 166 n.8 (1977), cited in *Whitley v. Albers*, 475 U.S. at 326; *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

[21] Just as CSO's McMillian and Wood and Lt. Mezo are now saddled with the factual finding in the courts below that they applied unjustified physical force to Prisoner Hudson, Prisoner Hudson is saddled with the finding of fact in the courts below that his injuries were minor at most.

Cruel and Unusual Punishment Clause. *See Whitley v. Albers*, 475 U.S. at 320. The Fifth Circuit's legal standard requires: (1) a significant injury which (2) resulted directly and only from the use of force that was clearly excessive to the need, (3) the excessiveness of which was objectively unreasonable, and (4) the action constituted an unnecessary and wanton infliction of pain. *Huguet v. Barnett*, 900 F.2d 838, 841 (5th Cir. 1990), and *Hudson v. McMillian*, 929 F.2d 1014, 1015 (5th Cir. 1990).

The legal standard used by the Fifth Circuit provides for an inquiry into both the objective and subjective components of an Eighth Amendment claim of cruel and unusual punishment arising out of conditions of confinement involving the use of physical force on a state prisoner. The factor of "significant injury that results from the use of physical force" provides the objective component; the factors of "excessive to the need" and "unreasonable" provide the subjective component. Both components are now required by This Court when this type of challenge is raised under the Eighth Amendment. *See Wilson v. Seiter*, 111 S.Ct. at 2323-28.[22] Prisoner Hudson's contention, that the objective component in the Fifth Circuit's legal standard for this kind of conduct is not constitutionally permissible, is incorrect and ill-founded.

A. A SINGLE INCIDENT IS NOT "PUNISHMENT" UNDER THE EIGHTH AMENDMENT

The alleged conduct of which CSO McMillian, CSO Woods, and Lt. Mezo were accused in this case was not a

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[22] The subjective component of the Fifth Circuit's legal standard is, by admission of Prisoner Hudson in his brief at 10 n.6, not being questioned.

part of Prisoner Hudson's sentence, served no penal purpose, and was not approved by higher prison officials. On the contrary, the undisputed testimony was that such conduct was against the rules of the prison and was grounds for disciplinary action against CSO's McMillian and Woods and Lt. Mezo, including dismissal (J.A. 23; Tr. 90 & 95-96). As alleged, it was essentially a personal dispute between correctional security officers and a prisoner, outside of, unforeseeable by, and strongly disapproved by higher officials of the prison.

Prisoner Hudson's brief relies heavily on the trial judge's footnote that this was not an "isolated incident that would arguably be outside of the Eighth Amendment," citing *George v. Evans* (J.A. 27).[23] While the judge was correct that an isolated and unauthorized incident would be outside of the Eighth Amendment, CSO's McMillian and Woods and Lt. Mezo respectfully suggest that the trial judge misinterpreted *George v. Evans*. Punishment, as correctly defined by *George v. Evans*, is action by guards, applied for a penal or disciplinary purpose, and authorized by high prison officials. It is distinguished from an isolated and unauthorized incident: "An isolated assault by individual guards on an inmate is not . . . punishment."[24]

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[23] Aside from the fact that the trial judge's statement is an opinion of law and not a finding of fact, the question of an isolated incident *is* before This Court because This Court has so ordered. Prisoner Hudson's revision of This Court's question is of no avail.

[24] *George v. Evans*, 633 F.2d 413, 415 (5th Cir. 1980). The magistrate's reliance below on *George v. Evans*, 620 F.2d 495

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George v. Evans does not distinguish punishment from an isolated and unauthorized incident by looking to see if the excessive force was repeated in the course of a single incident, as the trial judge apparently believed, but by looking to see whether the excessive force was a part of an essentially personal dispute between a prisoner and correctional security officers, outside of any regular penal activity of the prison. The Eighth Amendment prohibits "punishment" only, and a prisoner must look to other remedies – administrative, state, and federal – for an isolated and unauthorized incident.

The Fifth Circuit decided the appeal on other grounds, and the absence of discussion of the isolated-incident question is therefore of no significance, contrary to Prisoner Hudson's suggestion in his brief at 33 and fn. 32. Other courts have considered the question, however, at least implicitly, and Prisoner Hudson's statement, that This Court has never required proof of more than an isolated and unauthorized incident in an Eighth Amendment case, is not correct. *Estelle v. Gamble* and other medical-indifference cases typically involve a course of indifference, done with at least the implicit approval of higher prison officials. *Whitley v. Albers* was a single incident but done with the approval and participation of

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(5th Cir. 1980), J.A. 27, was misplaced because that decision was withdrawn and replaced by *George v. Evans*, 633 F.2d 413 (5th Cir. 1980).

a high ranking prison official in the course of quelling a riot. *Id.*, 475 U.S. at 315-16.

Prisoner Hudson tries to equate "single incident" with a single act, whereas under the Eighth Amendment "single incident" is essentially a term of art, with a special meaning that serves to define the boundaries of "punishment" in the Eighth Amendment. *Wilson v. Seiter* and other prison-conditions cases involve prevailing and continuing conditions, done with the approval of prison officials; a "single incident" is an act that serves no penal purpose and is done without the authorization of high prison officials, basically a personal dispute between a correctional security officer and a prisoner. In fact Prisoner Hudson's reliance on *Hutto v. Finney*, 437 U.S. 678 (1973), defeats his bold assertions that "single incident" is legally immaterial. The activities complained of in *Hutto* were specifically approved and authorized by high-ranking prison officials, *id.*, 437 U.S. at 682 nn.4-5, and do not constitute a "single incident."

"The thread common to all [Eighth Amendment prison cases] is that 'punishment' has been deliberately administered for a penal or disciplinary purpose." *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973), quoted in *Wilson v. Seiter*, 111 S.Ct. at 2325. "[A]lthough a spontaneous attack by a guard is 'cruel' and . . . 'unusual,' it does not fit any ordinary concept of 'punishment.' " *Id.*, 481 F.2d at 1032. Punishment is administered for a penal or disciplinary purpose with the apparent authorization of high prison officials charged by the state with the responsibility for care of prisoners. *Id.*

This case does not present even the question whether the action was implicitly approved or tolerated by prison officials' turning a blind eye to the action. The undisputed testimony is that the alleged conduct, if true, was contrary to prison regulations and subject to severe disciplinary action by prison officials (Tr. 90 & 95-96) – a textbook example of an isolated and unauthorized incident. Prisoner Hudson alleges that, after a heated exchange with CSO McMillian and Woods and Lt. Mezo, they took him aside and vented their anger on him physically (Tr. 55-56; J.A. 11-12 & 20-21). Their action as alleged was an unpremeditated resolution of a personal dispute, outside of and disapproved by any penal activity of the prison, "unforeseen and unforeseeable by higher authority." *Johnson v. Glick*, 481 F.2d at 1034.[25]

B. THE FIFTH CIRCUIT'S SIGNIFICANT INJURY STANDARD PROVIDES THE REQUIRED OBJECTIVE COMPONENT.

In Eighth Amendment challenges by prisoners to their conditions of confinement "due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged" must be given in setting any legal standard. *Whitley v. Albers*, 475 U.S. at 320, cited with approval in *Wilson v. Seiter*, 111 S.Ct. at 2326. This

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[25] The conduct complained of by Prisoner Hudson is not "punishment" within the Eighth Amendment's Cruel and Unusual Punishment Clause because, if it occurred in the manner accepted by the trial court, it was an act of private revenge rather than an action taken on behalf of the State of Louisiana through its prison officials.

case involves a claim of excessive and unnecessary use of physical force and the use of significant injury as the objective component is clearly appropriate. As pointed out by This Court in *Wilson v. Seiter*, "*Whitley* teaches that, *assuming the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim*, whether it can be characterized as "wanton" depends upon the constraints facing the official." *Wilson v. Seiter*, 111 S.Ct. at 2326 (emphasis added).

While the extent of the injury received by a prisoner cannot be used to determine the "wantonness" of the conduct of the prison official (the subjective component), *Wilson v. Seiter*, 111 S.Ct. at 2323-24, it is the logical threshold test of the seriousness of the deprivation in an excessive-force case (the objective component). Unless every unpermitted touching in a prison setting is to be called an Eighth Amendment violation, some degree of injury must be the direct result of touching. Even Prisoner Hudson in his brief admits that some degree of injury that resulted directly from the touching must be present in order for a prisoner to bring an Eighth Amendment claim based on excessive force. His objection is not so much that the injury requirement is inappropriate as that the particular facts of this case met the requirement of that threshold inquiry.[26]

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[26] *See* Prisoner Hudson's brief at 27 n.23. This same admission is made by the United States' amicus curiae brief at 9-11. Both Prisoner Hudson and the Solicitor General are merely objecting to the findings of fact in the courts below in this case, contending that Prisoner Hudson's injuries are significant. They are not here disputing that "significant injury" should be the objective factor.

This Court has recognized the importance of distinguishing state-law torts from "constitutional torts" (constitutional deprivations actionable under § 1983). Like the Fourteenth Amendment, the Eighth Amendment should not become "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976) (rejecting the contention that the Due Process Clause should extend a right wherever the state may be characterized as a tortfeasor).[27] In *Estelle v. Gamble* This Court said, "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." 429 U.S. 97, 106 (1976).

Likewise, other torts do not become constitutional violations merely because the defendant is a state official: "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles." *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (false imprisonment). "[T]his court has never held that every instance of use of 'unreasonable force' in effecting an arrest constitutes a violation of the Fourth Amendment. . . . " *City of Oklahoma v. Tuttle*, 471 U.S. 808, 817 n.4 (1985). The famous statement that "not every

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[27] Nor can § 1983 be used for that purpose. *See City of Oklahoma v. Tuttle*, 471 U.S. 808, 816 (1985) (plurality opinion of Rehnquist, C.J., White, J., and O'Connor, J.) ("By its terms, of course, [§ 1983] creates no substantive rights.").

push or shove" violates the Eighth Amendment, most recently repeated by This Court in *Graham v. Connor*, 490 U.S. 396 (1989), may be sharply distinguished from the state-law tort of battery, typically any unpermitted touching.[28]

Prisoner Hudson's brief acknowledges that there are subconstitutional deprivations, for example, "truly *de minimis* inflictions of pain or other injury may not violate the Eighth Amendment. . . . " (Prisoner Hudson's brief at p.7 n.4, his emphasis); "*Estelle* [*v. Gamble*] certainly contemplates that some medical needs are so trivial that the failure to treat them is not of constitutional import." (p.11 n.8); and "[p]etitioner agrees that not every 'push or shove' states an Eighth Amendment claim." (p.15 n.23).[29]

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[28] For example, the tort of battery in Louisiana is any intentional, unpermitted, and unprovoked contact with the plaintiff's person. *England v. S & M Foods, Inc.*, 511 So. 2d 1313, 1314 (La. Ct. App. 2d Cir. 1978). See also *Sonnier v. United States Casualty Co.*, 165 So. 2d 3 (La. 1964) (the doctrine of *de minimis* does not exist in Louisiana).

[29] The amicus curiae brief of the Solicitor General says at 13, by way of further example, that unnecessary and wanton infliction of pain – the standard demanded by Prisoner Hudson – will actually meet the Fifth Circuit's significant injury standard in all but the most unusual cases. Lesser injuries, continues the Solicitor General, should be considered "beneath constitutional concern." *Id.* The instant case is one of those "unusual cases." "Significant injury" as the objective component in these types of cases does not present a bright line but does, however, focus the judicial inquiry. The Solicitor General has merely misunderstood the application of the significant-injury requirement in this case, which is that the injuries were minor as a matter of fact and therefore not significant as a matter of law.

The parties thus agree that there is such a thing as a subconstitutional deprivation, and disagree only on where the line is to be drawn.

The test of what is "cruel and unusual," like any test, "should be informed by *objective* factors to the maximum possible extent." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (emphasis added), *quoting Rummel v. Estelle*, 445 U.S. 263 (1980). The lack of an objective standard turns every touching, and every claim of touching, into a constitutional case with no means of resolving the "swearing contest" short of an evaluation of credibility. Every alleged constitutional violation would become a purely factual inquiry without any objective legal standard to guide the inquiry.

Prisoner Hudson proposes that the criterion be pain. That is an unsatisfactory standard first, because it would encompass subconstitutional deprivations which, though not of constitutional import, still cause pain; the distinction between state-law torts and "constitutional torts" would be eliminated. Second, pain is a totally subjective phenomenon. That may be affirmed by a reference to personal-injury litigation, where claims of pain are highly subjective, yielding conflicting opinions from physicians even about the interpretation of such supposedly objective diagnostic devices as thermograms, MRI's, etc.

The objective factor used by the Fifth Circuit provides a workable and fair objective standard to separate state-law torts from "constitutional torts." As This Court observed in *Graham v. Connor*, "the other prongs of the Johnson v. Glick test" – including significant injury – "might be useful in analyzing excessive force claims

brought under the Eighth Amendment." 490 U.S. at 318 n.11 (1989).

Prisoner Hudson's objection to the significant injury standard posits a horrific array of less-than-significant injuries, administered by sinister guards to helpless prisoners. That rests, as does Prisoner Hudson's entire case, on the incorrect premise that the Fifth Circuit's test would leave correctional security officers and other prison personnel free to brutalize prisoners with impunity.[30] The real question is not whether Prisoner Hudson

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[30] For example, the amicus curiae brief of the Solicitor General says at 13 that the Fifth Circuit's test is "a rule that leaves the state 'free to inflict such pains without cause just so long as it is careful to leave no marks.' " Prisoner Hudson urges that This Court retain what can be described as an infliction-of-pain factor for the objective component, rather than significant injury, in a case of this type. One justification that he offers is that all of the states' correctional officials and correctional organizations unanimously condemn the practice of correctional security officers' using unjustified force on prisoners. Therefore, argues Prisoner Hudson in his brief at 18-25, the conduct complained of violates the Eighth Amendment. *See* the amicus curiae briefs of Americans for Effective Law Enforcement, Inc. at 1-7, of Prisoners' Legal Services of New York Amicus Brief at 11-16 & 19-32, and of D.C. Prisoners' Legal Services Project, Inc. at 36-38. *See also* the amicus curiae brief of Human Rights Watch at 4-11 (providing a supposedly international view). That argument – that cruel and unusual punishment is what society says it is – is circular, providing no baseline or constitutional limit. For example, if society through the state legislatures and the American Medical Association determined that incarcerating people for drug addiction was acceptable, then such a punishment could not be prohibited by the Eighth Amendment. *Cf.*, however, *Robinson v. California*,

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has any remedy at all, but whether he is entitled to the third of at least three concurrent and overlapping remedies, when he has voluntarily relinquished two of them and elected to proceed with the third only. Prisoner Hudson's unprotected-inmate objections are answered by looking to those other forms of relief that the law gives to prisoners and to other individuals.

The undisputed evidence at trial shows that there was an administrative remedy for Prisoner Hudson, potentially resulting in discipline or discharge of the offending guards (J.A. 9-10, 13-14, 16-18 & 23). Second, the states typically provide relief under their constitutions[31], their tort laws, and their criminal laws. A state

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370 U.S. 660 (1962). Likewise, if society through state legislatures and the American Correctional Association were to determine that housing prisoners twenty to a cell twenty-four hours a day was good penological practice, then that practice would not be proscribed by the Eighth Amendment. *Cf.*, however, *Rhodes v. Chapman*, 452 U.S. 337 (1981). That type of reasoning is faulty and undesirable, as it strips the Cruel and Unusual Punishment Clause of any real meaning.

The argument put forth in the briefs of Prisoner Hudson and his amici that approving a "significant injury" factor as the objective component in those types of cases would bring a return of the rack, the whipping post, the "Tucker Telephone," and so on, is unfounded and an affront to all correctional personnel in this country. The argument is an emotional plea that amounts to a red herring.

[31] The Louisiana Constitution of 1974, for example, has three sections that might have applied to Prisoner Hudson's allegations: Article I, § 3 ("Right to Individual Dignity"), § 12 ("Freedom from Discrimination"), and § 20 ("Right to Humane Treatment"). In Louisiana, a private right of action for violations of the state constitution exists. *See Moresi v. Dept. of*

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typically allows the tort of battery,[32] a remedy that is available to a state prisoner just as the United States allows federal inmates to file tort actions against the federal government under the Federal Tort Claims Act.

A state's criminal law is another remedy for an inmate.[33] "[N]umerous states have specifically criminalized the unnecessary use of force against prisoners," says Prisoner Hudson's brief at 19. Even in those states

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Wildlife & Fisheries, 567 So. 2d 1081, 1093 (La. 1990) (an individual is entitled to money damages for a violation of another section of Article I). At least two decisions of Louisiana courts show claims under the Louisiana Constitution by inmates of Camp J, the very camp in which Prisoner Hudson claims to have been injured. *Armstead v. Phelps*, 449 So. 2d 1049 (La. Ct. App. 1st Cir. 1984), and *Watts v. Phelps*, 377 So. 2d 1317 (La. Ct. App. 1st Cir. 1979), *writ denied*, 380 So. 2d 1210 (La. 1980).

[32] As does Louisiana, for example. See fn. 28 above. Nor would Louisiana's statute of limitations for torts (one year) be a "significant impedimen[t]" for an inmate, as suggested in the amicus curiae brief of Americans for Effective Law Enforcement at 5. The limitations period under § 1983 is borrowed from state law. *See Wilson v. Garcia*, 471 U.S. 261 (1985).

There is no support for the suggestion that states' statutory immunities may be "significant impediments," as argued without citation in the amicus curiae brief of Americans for Effective Law Enforcement. In Louisiana, for example, a defendant would have to show that he did not know the legal standard, *Moresi v. Department of Wildlife & Fisheries*, 567 So. 2d 1081, 1086-87 (La. 1990), an unlikely contention in a battery action.

[33] *See U.S. v. Muniz*, 374 U.S. 150 (1963) (a prisoner may recover damages under the FTCA for personal injuries).

that have not "specifically" criminalized such force, criminal statutes proscribe assault and battery.[34]

There is absolutely no support for the "belie[f]" that "the threat of civil suit in state courts is often an inadequate deterrent to officer misconduct," as stated in the amicus curiae brief of Americans for Effective Law Enforcement at 5. The supposed reluctance of elected judges to penalize local prison officers, *id.*, is a sweeping and obviously unsupportable aspersion on the integrity and impartiality of hundreds of judges (and juries) throughout the country, as is the notion that federal courts are impartial and state courts are not, as implied in *id.* at 3. Such implications are offensive to federalism and simply elitist.

Of the remedies listed above, there is no evidence that Prisoner Hudson was unaware of them, no evidence that he could not have used them, and no evidence that he made any attempt to use them: the only conclusion is that he intentionally waived those remedies. They are adequate in every respect except perhaps that § 1983 allows relief that is often more generous than that allowed by the States[35] – in other words, a potential for

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[34] See, for example, Louisiana Revised Statutes 14:33-38 (assault and battery) and 41-43.5 (rape and sexual battery). *See also* Prisoner Hudson's brief at 21 n. 7, which cites other states which provide protections to prisoners against unnecessary force.

[35] Louisiana, for example, does not permit an award of attorney's fees where not permitted by statute or contract, *Austin v. Parker*, 672 F.2d 508, 518 (5th Cir. 1982), and does not permit an award of punitive damages where not expressly

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getting more money, hardly a fit constitutional consideration. The CSO's Jack McMillian, Marvin Woods, and Lt. Mezo do not suggest that the availability of constitutional remedies should necessarily depend on the availability of state-law remedies, only that This Court should discount the emotional implication of Prisoner Hudson and his amici that the only shield between a prisoner and unlimited brutality is the Eighth Amendment.

The Fifth Circuit was correct in its dismissal of Prisoner Hudson's Eighth Amendment claim that CSO's McMillian and Woods and Lt. Mezo used unauthorized physical force on him in an isolated incident that did not cause Prisoner Hudson to suffer significant injury. The constitutional inquiry, however, need not stop here. Prisoner Hudson may have had a claim under the Due Process Clause of the Fourteenth Amendment.

III. PRISONER HUDSON DOES NOT HAVE AN EIGHTH AMENDMENT CLAIM, BUT MAY HAVE HAD A FOURTEENTH AMENDMENT DUE PROCESS CLAIM

In this case the allegation is made by a state prisoner that two state correctional officers used excessive and unnecessary physical force on him while another state

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authorized by statute, *International Harvester Credit Corp. v. Searle*, 518 So. 2d 1039, 1041 (La. 1988). Of course, even if Prisoner Hudson is not entitled to Eighth Amendment relief, he might have been entitled to Fourteenth Amendment substantive due-process relief (including all of the monetary advantages of a § 1983 action), had he elected to sue for it.

correctional officer stood by and watched. In such a case the substantive constitutional right at stake is the Cruel and Unusual Punishment Clause of the Eighth Amendment. *See Whitley v. Albers*, 475 U.S. at 318-26. *See also Graham v. Connor*, 490 U.S. at 394. This Court has recently stated that the Eighth Amendment, which applies to the States through the Due Process Clause of the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishment" on those convicted of crimes. *Wilson v. Seiter*, 111 S.Ct. at 2323. The Fourteenth Amendment's Due Process Clause requires that the several states afford due process of law before depriving individuals of rights secured elsewhere in the Constitution.[36]

Prisoner Hudson's claim is not one that arises under the Eighth Amendment's Cruel and Unusual Punishment Clause because unauthorized isolated acts by prison personnel, in violation of prison policy and for essentially personal rather than penal reasons, do not rise to the

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[36] While negligent deprivations by prison personnel are not cognizable under the Due Process Clause of the Fourteenth Amendment, *see Daniels v. Williams*, 474 U.S. 327 (1986), *Davidson v. Cannon*, 474 U.S. 344 (1986), and *Parratt v. Taylor*, 451 U.S. 527, 541 (1981), intentional deprivations may be. *Hudson v. Palmer*, 468 U.S. 517, 531 (1984) (property). *See also Daniels v. Williams*, 474 U.S. at 334 n.3, and *Davidson v. Cannon*, 474 U.S. at 346-48 (as to personal injury no determination on intentional denials). Intentional deprivations do not rise to a level of constitutional import under the Due Process Clause unless the State refuses to or does not provide an adequate remedy. *Hudson v. Palmer*, 468 U.S. at 531, and *Parratt v. Taylor*, 451 U.S. at 541. That has been the case since *Ingraham v. Wright*, 430 U.S. 651, 673-83 (1977). An intentional deprivation does not violate the Due Process Clause until the prisoner has given the State the opportunity to provide him with all the process that he is due.

level of punishment within the meaning of the Eighth Amendment. *See George v. Evans*, 633 F.2d at 415, and *Johnson v. Glick*, 481 F.2d at 1032. Such actions by prison personnel that cause injury to a prisoner, however, may rise to the level of a deprivation of a substantive due process right under the Fourteenth Amendment. *See Daniels v. Williams*, 474 U.S. 327, 333-34 (1986), and *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986). Under the Due Process Clause, however, if the State provides pre-deprivation restrictions and post-deprivation remedies for use of force, a violation of due process under the Fourteenth Amendment has not occurred. See *Ingraham v. Wright*, 430 U.S. at 672-82.

The conduct complained of by Prisoner Hudson is prohibited by prison rules and regulations, as well as by Louisiana's Constitution and other laws.[37] The State of Louisiana also provides to Prisoner Hudson and to all other prisoners adequate post-deprivation remedies to redress the conduct complained of as well as other types of unauthorized conduct by prisoner personnel.[38]

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[37] See fn. 28, 31 & 34 above, and fn. 38 below.

[38] In Louisiana, prison employees can be subjected to disciplinary action for engaging in the type of conduct complained of by Prisoner Hudson (J.A. 23; Tr. 90 & 95-96). It is also clear that Louisiana state courts are open to prisoners for the purpose of suing prison personnel who have caused them unjustified wrongs. For example, *see Parker v. State*, 282 So. 2d 483, 486-87 (La. 1973), *cert. denied*, 414 U.S. 1093 (1973); *Anderson v. Phelps*, 451 So. 2d 1284, 1285 (La. Ct. App. 1st Cir. 1984); *McGee v. State*, 417 So. 2d 416, 418 (La. Ct. App. 1st Cir.), *writ denied*, 420 So. 2d 871 (La. 1982); *Neathery v. State*, 395 So. 2d

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Therefore, while a prisoner might have a claim under the Due Process Clause in federal court under the same facts as asserted by Prisoner Hudson if the State did not provide pre-deprivation prohibitions and guidelines and post-deprivation remedies, Prisoner Hudson did not have a claim under the Due Process Clause because the State of Louisiana provides both pre-deprivation prohibitions and post-deprivation remedies.[39]

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407, 410 (La. Ct. App. 3d Cir. 1981); *Shields v. State Through Dep't of Corrections*, 380 So. 2d 123 (La. Ct. App. 1st Cir. 1979), *writ denied*, 382 So. 2d 164; *Craft v. State*, 308 So. 2d 290, 295 (La. Ct. App. 1st Cir.), *writ denied*, 319 So. 2d 441 (La. 1975), *cert. denied*, 423 U.S. 1075, 96 S.Ct. 859, 47 L.Ed.2d 84 (1975); *Lewis v. Listi*, 377 So. 2d 551, 553 (La. Ct. App. 3d Cir. 1979); *Bastida v. State*, 269 So. 2d 544, 545 (La. Ct. App. 1st Cir. 1972); *Adams v. State*, 247 So. 2d 149, 151 (La. Ct. App. 1st Cir. 1971); *St. Julian v. State*, 98 So. 2d 284 (La. Ct. App. 1st Cir. 1957); *Nedd v. State*, 281 So. 2d 131, 132 (La. 1973), *cert. denied*, 415 U.S. 957, 94 S.Ct. 1484, 39 L.Ed.2d 572 (1974); *Mack v. State*, 529 So. 2d 446, 448 (La. Ct. App. 1st Cir. 1988), *writ denied*, 533 So. 2d 359 (La. 1988); *Walden v. State*, 430 So. 2d 1224 (La. Ct. App. 1st Cir. 1983), *writ denied*, 435 So. 2d 430 (La. 1983); *White v. Phelps*, 387 So. 2d 1188 (La. Ct. App. 1st Cir. 1980); *Hampton v. State*, 361 So. 2d 257, 258 (La. Ct. App. 1st Cir. 1978); *Davis v. State*, 356 So. 2d 452, 454 (La. Ct. App. 1st Cir. 1977); *Betsch v. State*, 353 So. 2d 385, 359 (La. Ct. App. 1st Cir. 1977), *writ refused*, 354 So. 2d 1389 (La. 1978); *Williams v. State*, 351 So. 2d 1273 (La. Ct. App. 1st Cir. 1977); *Jones v. State*, 346 So. 2d 807, 808 (La. Ct. App. 1st Cir.), *writ refused*, 350 So. 2d 671 (La. 1977); *Walker v. State*, 346 So. 2d 794, 796 (La. Ct. App. 1st Cir.), *writ denied*, 349 So. 2d 879 (La. 1977); *Raney v. State*, 322 So. 2d 890 (La. Ct. App. 1st Cir. 1975); and *Bay v. Maggio*, 417 So. 2d 1386 (La. Ct. App. 1st Cir. 1982).

[39] The conduct complained of by Prisoner Hudson was against prison policy and state law. The conduct complained of

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IV. CONCLUSION

For the above reasons, CSO's McMillian and Woods and Lt. Mezo urge this Court to affirm the holding in the opinion of the Fifth Circuit.

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was therefore a random unauthorized act. The post-deprivation prohibitions and guidelines established by Louisiana and high prison officials at LSP did not prevent the alleged conduct by CSO's McMillian and Woods and Lt. Mezo. Because Louisiana provides post-deprivation remedies Prisoner Hudson must resort to the State post-deprivation remedies prior to his suing under the Due Process Clause of the Fourteenth Amendment. See *Hudson v. Palmer*, 468 U.S. 517, 532-34 (1984); *Parratt v. Taylor*, 451 U.S. 527, 541 (1981); *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986); and *Davidson v. Cannon*, 474 U.S. 344, 346-48 (1986). This has been the case since *Ingraham v. Wright*, 430 U.S. 651, 673-83 (1977). Prisoner Hudson has not been denied due process of law, but rather has ignored the process that he was due.

Supreme Court, U.S.
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No. 90-6531

In The

Supreme Court of the United States

October Term, 1991

KEITH J. HUDSON,

Petitioner,

v.

JACK McMILLIAN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I. THE WANTON INFLICTION OF PAIN, REGARDLESS OF THE PRESENCE OR ABSENCE OF SIGNIFICANT INJURY, VIOLATES THE EIGHTH AMENDMENT

A. There Is No Support in the Court's Eighth Amendment Precedent for Imposing a "Significant Injury" Test

Respondents argue that the unjustified beating of a prisoner by correctional officers does not violate the Eighth Amendment unless the prisoner suffers "significant injury," by which they mean a visible, tangible, or otherwise objectively verifiable physical injury.[1] Respondents, however, fail to demonstrate that such a requirement has any basis in the Eighth Amendment as it has been applied by this Court. Nor has any court ever articulated a rationale for applying a "significant injury" standard.

The lower court first adopted a "significant injury" test in *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) (*en banc*), a Fourth Amendment excessive force case. Seven judges dissented from that holding, pointing out that this added restriction on the scope of the Fourth Amendment was "imposed by *ipse dixit* without so much as a citation of authority or a statement of reasons for imposing [it]." *Id.* at 480 (Rubin, J., concurring in part and concurring in the judgment).[2] Moreover, since its decision in this case,

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[1] *See* brief of respondents at 22. Respondents nowhere in their brief discuss the possibility that a "significant injury" might not always require a physical injury. *Cf.* brief of United States at 13-14.

[2] As petitioner has already pointed out, this Court in *Graham v. Connor*, 109 S.Ct. 1865 (1989), did not adopt a

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even the Fifth Circuit appears to have retreated from respondents' position that the Eighth Amendment cannot be violated without proof of a significant *physical* injury.[3]

In an attempt to defend their position, respondents note that in the realm of medical care, the Eighth Amendment is violated only by deliberate indifference to "serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). From this undisputed proposition, respondents argue that a beating by guards cannot violate the Eighth Amendment unless it causes "significant injury." The analogy is a faulty one, however, because it confuses two separate notions. The "serious medical needs" referred to in *Estelle* are not caused by the state; rather, they trigger the state's obligation to provide constitutionally adequate medical care. When the state defaults on that constitutional obligation, it is liable under the Eighth Amendment regardless of whether its deliberate indifference results in significant or lasting injury. Indeed, *Estelle* makes clear that the appropriate inquiry under those circumstances is

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"significant injury" test in the Fourth Amendment context. Brief of petitioner at 17-18 n.13.

[3] *See McCord v. Maggio*, 927 F.2d 844, 849 (5th Cir. 1991) (while a showing of "significant injury" is required before a prisoner can recover damages under §1983, this requirement is satisfied by a showing that the prisoner "endured pain, suffering, and/or mental anguish sufficiently significant to justify monetary relief;" the prisoner need not show "lasting harm").

The "significant injury" test also appears to defy consistent application. For example, in *Oliver v. Collins*, 914 F.2d 56, 59 (5th Cir. 1990), the court held that what is a "significant injury" may depend on the presence or absence of justification for the use of force, thus intertwining the objective and subjective components of the Eighth Amendment test.

whether the state's actions (or inactions) have led to the "unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 104.[4] Respondents offer no plausible justification for imposing a higher standard in this case.

The analogy to "serious medical needs" relevant to this case would be serious interests in personal security. Deliberate indifference to either need would constitute a deprivation of "the minimal civilized measure of life's necessities" contrary to the Eighth Amendment, under *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). *See also DeShaney v. Winnebago County DSS*, 109 S.Ct. 998, 1005-1006 (1989):

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

(Citations omitted).

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[4] Consistent with this view, the lower courts have recognized that the Eighth Amendment can be violated when failure to treat a prisoner results in pain, even if it does not result in a worsening of the patient's condition. *See, e.g., Boretti v. Wiscomb*, 930 F.2d 1150, 1154-55 (6th Cir. 1991) (denial of dressing and pain medication for wound may violate Eighth Amendment, although wound did not become infected and eventually healed properly); *Washington v. Dugger*, 860 F.2d 1018, 1021 (11th Cir. 1988) (prisoner suffered from condition which "defied adequate prognosis and treatment," but certain treatments "eliminated pain and suffering at least temporarily;" denial of these treatments could violate Eighth Amendment).

Petitioner acknowledges that some interests in personal security, like some medical needs, may be too inconsequential to trigger constitutional protection. But the interest in not being beaten, kicked and punched by correctional officers, when no use of force is appropriate, surely passes over any reasonable threshold.

The recent case of *Wilson v. Seiter*, 111 S.Ct. 2321 (1991), also implicitly rejects the respondents' argument. In *Wilson*, the prison officials argued that a higher state of mind requirement should be applied in Eighth Amendment cases that do not rest on claims of physical injury. *Id.* at 2326. By its very nature, this argument presupposes that physical injury is not a prerequisite to all Eighth Amendment claims. More important for present purposes, the *Wilson* Court rejected the state's "suggestion that the 'wantonness' of conduct depends upon its effect upon the prisoner." *Id.* That conclusion is inconsistent with respondents' position that there is only one "effect upon [a] prisoner" that can ever give rise to an Eighth Amendment violation – namely, significant physical injury.

Finally, in their effort to establish a "significant injury" requirement, respondents quote selectively from *Graham v. Connor*, 109 S.Ct. at 1873 n.11. *See* brief of respondents at 35-36. The full quotation is as follows:

> We also suggested [in *Whitley v. Albers*, 475 U.S. 312 (1986)] that the other prongs of the *Johnson v. Glick* [481 F.2d 1028 (2d Cir. 1972)] test might be useful in analyzing excessive force claims brought under the Eighth Amendment. 475 U.S., at 321, 106 S.Ct., at 1085. But we made clear that this was so *not* because Judge Friendly's four-part test is some talismanic formula generally applicable to all excessive force claims, but because its four factors help to focus the central inquiry in the Eighth Amendment context, which is whether the particular use of force amounts to the "unnecessary and wanton infliction of pain." See *id.*, at 320-321, 106 S.Ct., at 1084-1085.

Graham, 109 S.Ct. at 1873 n.11 (emphasis in original).

This case involves only the objective prong of the Eighth Amendment test. An examination of the portions of *Whitley v. Albers*, 475 U.S. 312 (1986), cited by the *Graham* Court reveals that the *Whitley* Court found the "extent of injury inflicted" relevant to the *subjective* prong of the Eighth Amendment test. *Whitley*, 475 U.S. at 320-321. The objective prong of the test was simply not at issue in that case. *Id.*[5]

B. Pain Is the Appropriate Criterion for Judging Eighth Amendment Claims

As demonstrated in petitioner's opening brief, this Court has consistently analyzed Eighth Amendment claims to determine whether the challenged government action inflicted pain, not whether it resulted in significant injury. *See, e.g., Graham v. Connor*, 109 S.Ct. at 1872-1873 n.11, referring to "the central inquiry in the Eighth Amendment context, which is whether the particular use

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[5] Similarly, no issue involving subjective intent is presented by this case. Contrary to respondents' assertion, brief of respondents at 21 n.13, petitioner does not concede that the "malicious and sadistic" state of mind standard, rather than the "deliberate indifference" test, applies to the instant case. Rather, petitioner notes that, since the trial court found that respondents acted with malice, this question is not before the Court. Brief of petitioner at 10 n.6.

of force amounts to the unnecessary and wanton infliction of pain." (Citation and internal quotation marks omitted). Not all inflictions of pain result in physical injury, much less "significant" injury.[6]

Nevertheless, respondents urge that this Court abandon its traditional Eighth Amendment criterion of pain because "pain is a totally subjective phenomenon." Brief of respondents at 35. Of course no device can measure pain, as a thermometer can measure temperature or a scale can measure weight. But the acts that occurred here – punches to the eyes, mouth, chest and stomach and kicks to the body[7] – surely pass any reasonable

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[6] Thus, contrary to respondents' assertion in their brief at 32 n.26, petitioner does indeed dispute the propriety of the "significant injury" test.

[7] Respondents purport to "accept that they are now saddled with the findings of fact by the District Court and the approval of those factual findings by the Fifth Circuit," brief of respondents at 9, and then proceed to argue the facts throughout their brief. *See, e.g., id.* at 10 n.5, 11 n.7, 20 n.13. Because this Court's grant of certiorari is limited to the legal test applied by the court of appeals, *Hudson v. McMillian*, 111 S.Ct. 1679, 1680 (1991) (*mem.*), such factual argument is foreclosed.

Respondents are incorrect, however, in their assertion that "the fact-finding that [p]risoner Hudson suffered only 'minor injuries' is binding on [p]risoner Hudson." Brief of respondents at 11. All parties are indeed bound by the trial court's finding that the beating of petitioner resulted in "minor bruises and swelling to [petitioner's] face, mouth and lip, and also damaged his partial plate sufficiently to make it unwearable for three to four months." App. at 26. However, the trial court's overall description of these injuries as "minor" is not a finding of fact, but a characterization of the facts the court found.

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threshold.[8] From these objectively verifiable acts, it is possible to infer that pain occurred[9] – the pain an ordinary person would suffer upon, for example, being punched in the eyes. *See, e.g.*, Tr. at 79-80 (testimony of petitioner that beating cracked his dental plate,[10] split his

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Having already found respondents liable, the trial court was attempting to make an appropriate award of damages to petitioner. It was in this context that the court characterized his injuries as "minor." Nevertheless, the trial court found that petitioner's injuries merited an award of $800. App. at 29. Thus, the court obviously believed petitioner's injuries to be more than trivial. *Cf. McHenry v. Chadwick*, 896 F.2d 184, 186 (6th Cir. 1990) (prisoner was beaten to the ground by six officers who struck him in the back, stomach, and legs, including one officer who beat him with a club; prisoner was awarded $150.00 in compensatory damages).

[8] Certain inflictions of *de minimis* pain would not violate the Eighth Amendment. All parties and amici agree that not every unconsented touching of a prisoner by a guard violates the Eighth Amendment. The disagreement concerns the nature of the threshold.

[9] In *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), this Court held that prison conditions violate the Eighth Amendment when they result in "unnecessary and wanton infliction of pain." Accordingly, ever since *Estelle*, the lower courts have been required to make inferences about whether the failure to provide medical care inflicted pain. The lower courts have been able to make such determinations without any apparent difficulty. *See also Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (determining that overcrowding did not inflict pain and therefore could not violate the Eighth Amendment).

[10] Respondents assert that "[t]he damage to [p]risoner Hudson's partial dental plate is damage to property and not to the person, and will not hereinafter be considered as part of the physical injuries received." Brief of respondents at 12 n.8.

(Continued on following page)

lip, loosened his teeth, caused pain in his chest, and rendered his eyes bruised and swollen).

Respondents express concern about the potential for a "swearing contest" and the need for an evaluation of credibility.[11] Brief of respondents at 35. However, a need

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Petitioner, however, submits that cracking his dental plate by repeatedly punching him in the mouth while he was wearing it constitutes an injury to the person. *See* Tr. at 79, lines 2-15. Moreover, the fact that petitioner was hit hard enough to crack a dental plate inside his mouth is highly probative of the amount of force used and the pain inflicted.

[11] Respondents cite statistics from the Administrative Office of the United States Courts, purporting to show a slight increase in "prisoner filings" between 1985 and 1989. Brief of respondents at 15 n.9. The implicit argument is that this Court should impose a "significant injury" requirement simply to discourage and facilitate summary disposition of prisoner lawsuits.

However, the statistics cited by respondents are most unenlightening. For example, we are not told if these figures include habeas corpus actions, which accounted for 38% of all prisoner cases between 1974 and 1985. Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 661 (1987). Nor do these numbers take into account the fact that the number of state and federal prisoners increased by 134% between 1980 and 1990. Bureau of Justice Statistics Bulletin, *Prisoners in 1990*, May 1991, p.1. In reality, between 1975 and 1984, combined habeas corpus and prisoner civil rights filings increased at only half the rate of total civil filings. Eisenberg & Schwab, *supra*, at 693 n.212.

At any rate, this Court should not restrict the availability of a Congressionally-created remedy for a constitutional violation simply because, in the view of some, too many people are availing themselves of it. This Court has held that the Court's role, when concerns about federal caseloads are raised, "is not to make policy, but to interpret [federal law]." *Neitzke v. Williams*, 109 S.Ct. 1827, 1832 (1989). The federal courts are bound

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to resolve differing views of the facts is the essence of litigation, and is certainly not limited to lawsuits brought by prisoners alleging excessive force. Indeed, one of the core functions of the finder of fact is to make evaluations of credibility. *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 574-575 (1985).[12]

In sum, respondents urge this Court to jettison its traditional Eighth Amendment test and embrace a new standard that has no rationale and has proved impossible

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to enforce the Constitution, even if it requires the adjudication of additional cases. As Justice Harlan recognized a generation ago:

> Judicial resources . . . are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Harlan, J., concurring in the judgment).

[12] As this case well illustrates, even the presence of objectively verifiable injuries by no means eliminates the possibility of a "swearing contest." *See* brief of state attorneys general at 10 n.6:

> Usually the inmate claims that he did nothing to provoke an attack and is baffled by the fact that the officers felt the need to use force. . . . The officers' claim generally is that the inmate resists the move or is otherwise recalcitrant (although in this case the officers deny that the incident ever took place).

to apply consistently. It is an invitation this Court should decline.

II. THE UNJUSTIFIED BEATING OF A PRISONER BY CORRECTIONAL OFFICERS VIOLATES THE EIGHTH AMENDMENT

A. The Beating of Petitioner Was Not an Act of Private Revenge

Respondents argue that the beating of petitioner does not violate the Eighth Amendment because it was "an act of private revenge;" because the state officers involved were "lower-ranking correctional personnel;" and because the beating was an "isolated incident." These arguments individually are unavailing, as set forth below and in petitioner's opening brief.[13] Collectively, they seem intended to suggest that cruel and unusual treatment is not "punishment" unless it is somehow ratified as official policy or authorized by personnel bearing some unspecified degree of authority.[14]

Such an argument is contrary to the holding of *Wilson v. Seiter*, decided last term. *Wilson* stated a different and much simpler approach to the definition of punishment: "If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." 111 S.Ct. at 2325. (Emphasis in original).

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[13] Petitioner discussed the "isolated incident" argument in his opening brief at 34-37.

[14] Such arguments, while perhaps relevant to the liability of the State of Louisiana, *cf. City of St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988), have no bearing on the liability of the individual officers who actually administered and approved the beating of petitioner.

This *Wilson* analysis is applicable to *any* "inflicting officer," from a line correctional officer to a prison warden or state commissioner. This analysis, in addition to its doctrinal merits, corresponds to the reality of prison life, in which lower-level employees wield enormous practical authority over every aspect of prisoners' lives, and possess equally great power to do harm by virtue of that authority and the insulation of prisons from public scrutiny.[15]

The respondents' argument that the beating of petitioner was merely "an act of private revenge rather than an action taken on behalf of the State of Louisiana through its prison officials" (brief of respondents at 31 n.25)[16] is squarely contradicted by the evidence introduced by respondents in the district court. According to respondent Woods, petitioner was being taken to the lockup unit because he and another prisoner were "causing a disturbance," and petitioner disregarded respondent Woods' "several direct verbal orders to stop

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[15] Eighth Amendment adjudication in the lower courts has demonstrated that many of the worst abuses of prisoners are perpetrated by relatively low-level staff members, often without the knowledge or authorization of their superiors and in direct contravention of the prison's official policies. *See, e.g., Parrish v. Johnson*, 800 F.2d 600 (6th Cir. 1986) (campaign of torment of paraplegic inmates by prison officer); *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971) (directing an injunction against surreptitious and unauthorized physical abuse by line staff).

[16] Respondents repeatedly refer to the beating as involving a "personal dispute" between petitioner and respondents. *See, e.g.*, brief of respondents at 29 ("an essentially personal dispute between a prisoner and correctional security officers, outside of any regular penal activity of the prison").

hollering." App. at 14. Petitioner was cited for violation of prison rules (App. at 17), and was found guilty. App. at 12.

It is difficult to understand why respondents believe this to be a "personal dispute."[17] There is no contention that respondents were motivated by some dispute with petitioner that originated outside the prison walls and was unrelated to their relationship as prisoner and guards. Rather, respondents used their authority as officers of the state to place petitioner in restraints, remove him from his cell, beat him, and then charge him with rule violations.

Respondents' contention is actually an argument about "color of state law." As such, it was answered by the Court thirty years ago: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law." *Monroe v. Pape*, 365 U.S. 167, 184 (1961), *quoting United States v. Classic*, 313 U.S. 299, 326 (1941) (plurality opinion) (internal quotation marks omitted).

In addition, respondents argue that the beating of petitioners does not implicate the Eighth Amendment because the officers involved, including Lieutenant Mezo, are "lower-ranking correctional personnel" (brief of

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[17] The State of Louisiana provided legal representation to respondents in the lower courts and in this Court, implicitly recognizing that the respondents' involvement in this case is inextricably intertwined with their role as agents of the State. *Cf. West v. Atkins*, 108 S.Ct. 2250 (1988), discussed in text, *infra*. The physician in *West*, like the respondents here, was represented by the State's Attorney General. *See id.* at 2253 n.4.

respondents at 13) rather than "high-ranking prison officials" (*id.* at 11). They attempt to distinguish *Whitley v. Albers* on the ground that there, the use of force was authorized by a "high-ranking prison official." *Id.* at 29-30. In reality, the officer in *Whitley* was a captain, one rank higher than a lieutenant. 475 U.S. at 315. Respondents provide no authority for the proposition that Eighth Amendment liability should turn on such picayune distinctions.[18]

Indeed, in *West v. Atkins*, 108 S.Ct. 2250 (1988), this Court implicitly rejected the proposition that only actions undertaken or condoned by supervisory staff can violate the Eighth Amendment. In that case, the Court held that a private physician, employed part-time to treat state prisoners, acts under color of state law for purposes of 42 U.S.C. § 1983. The Court assumed that the actions of such a physician could violate the Eighth Amendment:

> Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth

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[18] Respondents similarly attempt to distinguish *Hutto v. Finney*, 437 U.S. 678 (1978), on the ground that "[t]he activities complained of in *Hutto* were specifically approved and authorized by high-ranking prison officials, *id.*, 437 U.S. at 682 nn. 4-5." Brief of respondents at 30. The cited portion of *Hutto* says exactly the opposite. Footnote 4 states that prisoners were sometimes flogged with a leather strap for minor offenses, "[a]lthough it was not official policy to do so."

More fundamentally, the need to establish "official policy" is relevant only when the governmental entity is itself a defendant. *See, e.g., Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

> Amendment rights. The State bore an affirmative obligation to provide adequate medical care to [petitioner], the State delegated that function to respondent [physician]; and respondent voluntarily assumed that obligation by contract.

Id. at 2259 (footnote omitted).[19] If a physician who has no penological responsibilities, and certainly no supervisory responsibilities over correctional functions, can transgress against the Eighth Amendment, then *a fortiori* a correctional officer who beats a prisoner violates the Eighth Amendment.

Obviously no corrections system has an official policy allowing the punishment of prisoners through unprovoked beatings. To limit the scope of the Eighth Amendment to beatings that represented official policy would deprive prisoners of protection from cruel and unusual punishment resulting from physical abuse by corrections staff.

B. The Eighth Amendment Is the Primary Source of Protection for Convicted Prisoners Against Official Violence

Respondents argue that if the beating of petitioner violates any constitutional provision, it is the due process clause of the Fourteenth Amendment, rather than the Eighth Amendment. However, as amici state attorneys general recognize, "[t]he eighth amendment provides the

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[19] One Justice, concurring in the judgment, did not believe that a physician "who lacks supervisory or other penological duties can inflict 'punishment' within the meaning of that term in the Eighth Amendment." *Id.* at 2260 (Scalia, J., concurring). Even under this view, respondents – who surely have "penological duties" – can indeed inflict punishment.

substantive source of constitutional protection for convicted prisoners in the prison security context." Brief of state attorneys general at 4. Indeed, this Court has made that clear:

> We need say little on this score. We think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified.

Whitley, 475 U.S. at 327. *See also Graham v. Connor*, 109 S.Ct. at 1871 n.10 ("Any protection that 'substantive due process' affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment," citing *Whitley*).[20] This principle is well settled; *see, e.g., Ingraham v. Wright*, 430 U.S.

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[20] Indeed, in *Graham*, this Court criticized the indiscriminate use of "substantive due process" when more specific constitutional provisions apply:

> In the years following *Johnson v. Glick* [481 F.2d 1028 (2d Cir. 1972)], the vast majority of lower federal courts have applied its four-part "substantive due process" test indiscriminately to all excessive force claims lodged against law enforcement and prison officials under § 1983, without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard.
>
> * * *
>
> We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard. . . . In addressing an excessive

(Continued on following page)

651, 669 (1977) ("Prison brutality . . . is part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny") (citation and internal quotation marks omitted). Accordingly, the lower courts were correct to analyze this case under the Eighth Amendment.

C. Even if Petitioner's Claim Did Arise Under the Due Process Clause, the Existence of State Remedies Is Irrelevant

As demonstrated in the preceding section, petitioner's claim arises under the Eighth Amendment, not the due process clause. But even if respondents were correct that petitioner's claim were a due process claim, they are incorrect that the existence of state court remedies is relevant. Respondents attempt to argue that petitioner's claim arises under the due process clause because they seek to establish the position that since "the State provides pre-deprivation restrictions and post-deprivation remedies" for use of force, a violation of due process under the Fourteenth Amendment has not

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(Continued from previous page)

> force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct.

Graham, 109 S.Ct. at 1870 (footnotes and citations omitted).

occurred. Brief of respondents at 42-43.[21] The flaw in respondents' argument is that petitioner's claim, if it were a due process claim, would be based upon substantive, not procedural, due process, as respondents concede.[22]

In *Zinermon v. Burch*, 110 S.Ct. 975 (1990), this Court authoritatively rejected any claim that state remedies are relevant to the existence of a substantive due process claim:

> [T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. As to [substantive due process claims], the constitutional violation actionable under § 1983 is complete when the wrongful action is taken. A plaintiff, under *Monroe v. Pape*, may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.

Id. at 983. (Internal citations and quotation marks omitted).

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[21] It is interesting that respondents urge the Court to trust to the availability of state-created remedies while the State continues to reject the factual findings of the trial court. *See* brief of respondents at 10. If the State remedies were meaningful they would have been triggered by the findings of the trial court, and the State would have proceeded against the respondents rather than represent them in this Court. Of course, the right to a § 1983 remedy does not depend on the inadequacy of state remedies. *Monroe v. Pape*, 365 U.S. at 183.

[22] Respondents concede that any due process claim that could be asserted by petitioner is a claim of substantive due process. Brief of respondents at 42.

III. THE EIGHTH AMENDMENT PROHIBITS THE RESPONDENTS' CONDUCT

Respondents object to petitioner's citation of the fact that numerous states and the federal government have criminalized brutality by prison guards, and that correctional organizations similarly condemn this practice. These facts, respondents argue, are irrelevant to the determination of whether the practice violates the Eighth Amendment. Brief of respondents at 36-37 n.30. However, *Stanford v. Kentucky*, 109 S.Ct. 2969 (1989). establishes the relevance of petitioner's citations:

> As we have said, Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.
>
> * * *
>
> [F]irst among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society's elected representatives.

Id. at 2975 (citations and internal quotation marks omitted). The Court then examined state statutes regarding the execution of minors to determine whether a national consensus existed on this issue. *Id.* at 2975-76. Significantly, none of the briefs submitted to the Court in this case on either side defend the conduct of the respondents as remotely resembling appropriate staff behavior.

It is critical to remember what is at stake in this case. The court of appeals, in rejecting petitioner's Eighth Amendment claim, recounted petitioner's injuries as follows:

> The evidence reflects that on October 30, 1983 Hudson got into an argument with McMillian who punched Hudson in the mouth, eyes, chest, and stomach while Woods held him. The blows cracked Hudson's partial dental plate, split his lower lip and loosened his teeth. He received bruises to his body but no other cuts. Woods kicked Hudson on his backside. Mezo, the supervisor of McMillian and Woods, watched the beating but merely cautioned the officers not to "have too much fun."

App. at 31.

If the Court rejects petitioner's arguments, then this beating was constitutional, and correctional officers who administer such unauthorized and unjustified beatings will no longer be restrained by the federal courts. The wanton brutalization of prisoners by guards is as abhorrent as the Tucker telephone[23] and equally inconsistent with evolving standards of decency. This Court should not endorse an interpretation of the Eighth Amendment that requires the federal courts to ignore such abuses of official power.

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[23] *See* petitioner's opening brief at 22 n.18.

CONCLUSION

For the above reasons, petitioner urges this Court to reverse the court of appeals and reinstate the judgment of the trial court in favor of petitioner.

Respectfully submitted,

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No. 90-6531

In the Supreme Court of the United States

OCTOBER TERM, 1991

KEITH J. HUDSON, PETITIONER

v.

JACK MCMILLIAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the court of appeals correctly determined that a beating by prison guards that "occasioned unnecessary and wanton infliction of pain," J.A. 32, did not constitute cruel and unusual punishment because the prisoner did not suffer "a significant injury," J.A. 33.

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INTEREST OF THE UNITED STATES

The court of appeals held that a beating administered by prison guards did not constitute cruel and unusual punishment because the prisoner's injuries were not significant enough to require medical attention. Several interests of the United States are affected by the application of the Cruel and Unusual Punishments Clause of the Eighth Amendment in this context. First, the Department of Justice has authority under 18 U.S.C. 242 to prosecute persons who deprive others of constitutionally protected rights under color of law and has used this authority to prosecute state prison guards in circumstances similar to those presented by this case. Second, the De-

partment of Justice defends actions brought by federal inmates alleging violations of the Eighth Amendment. Finally, the United States has a general interest in ensuring that the law regarding violent conduct by law enforcement officials adequately protects the rights of citizens while taking into account the legitimate concerns of law enforcement officials.

STATEMENT

1. Petitioner Keith Hudson is an inmate confined in the Louisiana state penitentiary in Angola, Louisiana. On October 30, 1983, petitioner became involved in a dispute with a prisoner in an adjacent cell. After respondent Jack McMillian, a corrections officer at the penitentiary, told petitioner to be quiet, petitioner and McMillian argued. McMillian and the two other respondents (Marvin Woods and Arthur Mezo), who were also employees at the penitentiary, then placed petitioner in handcuffs and shackles to move him to another cell. Petitioner did not resist. On the way to the other cell, McMillian punched petitioner several times in the mouth, eyes, chest, and stomach, while Woods held petitioner by the back of his jumpsuit and kicked him from behind. J.A. 20-23, 26, 31. Mezo, a lieutenant and the supervisor of Woods and McMillian, did nothing to stop the beating, but "cautioned the officers not to 'have too much fun.'" J.A. 31. The beating "cracked [petitioner's] partial dental plate, split his lower lip and loosened his teeth." *Ibid.* Petitioner also "received bruises to his body." *Ibid.*

2. Invoking 42 U.S.C. 1983, petitioner commenced this action in the United States District Court for the Middle District of Louisiana, contending that the beating by the respondents constituted cruel and unusual punishment. The parties consented to a trial

before a magistrate pursuant to 28 U.S.C. 636(c). The magistrate found that "Woods and McMillian used force on [petitioner] when there was no need to use any force at all, and that Mezo expressly condoned the use of force." J.A. 26. The magistrate further found that "the force used resulted in minor bruises and swelling to [petitioner's] face, mouth and lip, and also damaged his partial plate sufficiently to make it unwearable." *Ibid.*

The magistrate said that to determine whether physical abuse by prison guards constitutes an Eighth Amendment violation, "the court must consider three factors: the amount of force exerted relative to the need for its application[;] the extent of injury inflicted; and the motivation of the officers." J.A. 27. Because in this case "there was no need to use any force since [petitioner] was already in restraints," the magistrate held that respondents "violated [petitioner's] rights under the Eighth Amendment by the use of unnecessary and excessive force." J.A. 27, 28. But because petitioner had "proved only minor injuries to his back and mouth" and had not sought punitive damages, the magistrate awarded just $800 in damages. J.A. 28-29.

3. The court of appeals applied the four-part test articulated in its decision in *Huguet* v. *Barnett*, 900 F.2d 838 (1990), which required petitioner to prove:

1. a significant injury, which
2. resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was
3. objectively unreasonable, and
4. the action constituted an unnecessary and wanton infliction of pain.

J.A. 32 (quoting *Huguet*, 900 F.2d at 841). The court agreed that the second, third, and fourth elements of the test were met. It explained that "no force was required; therefore, the force used was objectively unreasonable," and added that "[t]he conduct of McMillian and Woods qualified as clearly excessive and occasioned unnecessary and wanton infliction of pain." J.A. 32. But the court of appeals found that petitioner's claim "founders on the significant injury prong." *Ibid.* Stressing that the magistrate "characterized [petitioner's] injuries as 'minor' and noted that they 'required no medical attention,'" the court held that they did not "constitute a significant injury." J.A. 33.

SUMMARY OF ARGUMENT

The sole test this Court has used to determine whether prison officials violated the Eighth Amendment by taking actions not required by the terms of an inmate's sentence is whether the actions constituted "unnecessary and wanton infliction of pain." See, *e.g.*, *Wilson* v. *Seiter*, No. 89-7376 (June 17, 1991), slip op. 2. In our view, that is the proper test in this case.

In considering whether actions taken by prison officials were unnecessary and wanton, courts should recognize the difficult task prison officials face in trying to maintain security within correctional institutions and should not second-guess the decisions of prison officials regarding the need to employ force to further legitimate disciplinary and security concerns. But in this case the factual findings show that there was no need for application of any significant amount of force because petitioner was handcuffed and in shackles and not resisting the guards when

he was beaten. Thus, respondents acted in an unnecessary and wanton fashion.

The test applied by the court of appeals imposes a threshold requirement that a prisoner establish that a beating caused a "significant injury," and the court of appeals found that there was no significant injury in this case because petitioner did not require medical attention. The court of appeals' test is faulty because it would shield any action, however torturous, so long as it leaves no lasting marks. The court should have focused instead on whether petitioner experienced substantial *pain*, wantonly inflicted. Although most cases involving such an infliction of pain also will involve significant and objectively demonstrable physical harm, an acceptable rule must allow prisoners to prove that prison officials unnecessarily and wantonly inflicted considerable pain, even if the prisoner did not suffer such a harm. In our view, the magistrate's findings show that petitioner must have experienced considerable pain on account of the beating respondents inflicted on him.

ARGUMENT

A BEATING BY PRISON GUARDS THAT OCCASIONED "UNNECESSARY AND WANTON INFLICTION OF PAIN" CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment proscribes the infliction of "cruel and unusual punishments." Most of the cases interpreting the Amendment have considered the constitutionality of sentences imposed by a court, but the provision also has been applied to "deprivations that were not specifically part of the sentence but were suffered during imprisonment." *Wilson* v. *Seiter*, No. 89-7376 (June 17, 1991), slip op. 2. This Court has

applied a variety of tests to determine whether a sentence violates the Eighth Amendment. See, *e.g.*, *Gregg* v. *Georgia*, 428 U.S. 153, 170-173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (discussing Eighth Amendment rules against punishments that are torturous, disproportionate, and excessive). However, it uniformly has evaluated the cruelty of nonsentencing deprivations by considering whether they involve "unnecessary and wanton infliction of pain." See *Wilson*, slip op. 2; *Graham* v. *Connor*, 490 U.S. 386, 398 n.11 (1989); *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986); *Rhodes* v. *Chapman*, 452 U.S. 337, 346 (1981); *Estelle* v. *Gamble*, 429 U.S. 97, 103-104 (1976); see also *Gregg* v. *Georgia*, 428 U.S. at 173 (joint opinion of Stewart, Powell, and Stevens, JJ.) (first articulating this test).[1]

[1] The Eighth Amendment does not prohibit all acts that are "cruel and unusual," but only cruel and unusual "punishments." It has been suggested that some actions taken by prison employees might not have a sufficient patina of state authorization to constitute "punishment" under the Eighth Amendment, even if the employee clearly is acting under color of state law for purposes of Section 1983 (although the actions nevertheless might be subject to scrutiny under the Due Process Clause). See, *e.g.*, *West* v. *Atkins*, 487 U.S. 42, 58 (1988) (Scalia, J., concurring) ("I do not believe that a doctor who lacks supervisory or other penological duties can inflict 'punishment' within the meaning of that term in the Eighth Amendment."); *Johnson* v. *Glick*, 481 F.2d 1028, 1032 (2d Cir.) (per Friendly, J.) ("[A]lthough a spontaneous attack by a guard is 'cruel' and, we hope, 'unusual,' it does not fit any ordinary concept of 'punishment.'"), cert. denied *sub nom. John* v. *Johnson*, 414 U.S. 1033 (1973); *George* v. *Evans*, 633 F.2d 413, 415 (1980) ("An isolated assault by an individual guard on an inmate is not, within the meaning of the eighth amendment, punishment."); cf. *Graham*, 490 U.S. at 392 n.6 (noting the issue). But see, *e.g.*, *Duckworth* v. *Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) (per Posner, J.) ("If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment, and 'cruel and unusual' because the Supreme Court has interpreted the term to forbid unauthorized * * * punishment."), cert. denied, 479 U.S. 816 (1986). There is some force to these suggestions. If, for example, a prison guard shot both a prisoner and a fellow guard on account of some personal dispute, it would seem clear that the guard who was shot had not been "punished," and it is not clear why a different result should obtain with respect to the prisoner.

Although this Court has not explicitly addressed the issue, the Court implicitly held in *Estelle*, 429 U.S. at 104-105, that prison doctors can "punish" inmates, without requiring a showing of official authorization. See *Ingraham* v. *Wright*, 430 U.S. 651, 688 & n.4 (1977) (White, J., dissenting). This suggests that the required amount of authorization, if any, should be significantly less than that required to show that an action was mandated by a government policy to such an extent that the government itself may be held liable for damages. See, *e.g.*, *St. Louis* v. *Praprotnik*, 485 U.S. 112, 124-127 (1988) (plurality opinion of O'Connor, J.); *id.* at 138-140 (Brennan, J., concurring). There may well have been sufficient authorization here, where respondent Mezo, the supervisor of respondents McMillian and Woods, observed the beating, did not stop it, and merely cautioned the subordinate guards not to "have too much fun," J.A. 31. In any event, because the issue was neither discussed by the court of appeals nor raised in the papers accompanying this Court's grant of plenary review, this Court need not address the issue. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 414 (1982). Nonetheless, greater doctrinal clarity in this respect is of increasing practical importance in view of the substantial expansion in recent years in the number of cases of this sort.

A. Respondents Unnecessarily And Wantonly Inflicted Pain On Petitioner

Although the phrase "unnecessary and wanton infliction of pain" literally requires a prisoner to demonstrate that pain was inflicted both unnecessarily

and wantonly, in many cases the issues will blend together. That is because evidence establishing that a particular action was motivated by legitimate concerns for prison security or discipline will show both that the action was necessary and that the official did not act wantonly. Similarly, proof that the action served no legitimate purpose would tend to prove both that the action was unnecessary and that the official acted wantonly in taking the action.

As this Court has noted, in evaluating constitutional claims relating to the operation of prisons "courts must bear in mind that their inquiries 'spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility.'" *Rhodes* v. *Chapman*, 452 U.S. at 351 (quoting *Bell* v. *Wolfish*, 441 U.S. 520, 539 (1979)). In *Whitley*, this Court considered actions prison employees took in response to a full-scale riot. The Court emphasized the "responsibility of ensuring the safety of the prison staff administrative personnel, and visitors, as well as the 'obligation to take reasonable measures to guarantee the safety of the inmates themselves.'" 475 U.S. at 320 (quoting *Hudson* v. *Palmer*, 468 U.S. 517, 526-527 (1984)). The Court concluded that the need to "balanc[e] competing institutional concerns for the safety of prison staff or other inmates" requires courts to understand that "infliction of pain in the course of a prison security measure * * * does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense." *Whitley*, 475 U.S. at 319-320.

These comments are just as apposite in the present context, because the "ever-present potential for

violent confrontation and conflagration" that exists in prisons, 475 U.S. at 321 (quoting *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977)), inevitably requires a balancing of those same concerns even *before* violent confrontations have broken out. See *Dudley* v. *Stubbs*, 489 U.S. 1034, 1037-1038 (1989) (O'Connor, J., dissenting from denial of certiorari) (suggesting that *Whitley* applies even in the absence of a full-scale riot). As Judge Friendly put it:

> The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.

Johnson v. *Glick*, 481 F.2d 1028, 1033 (2d Cir.), cert. denied *sub nom. John* v. *Johnson*, 414 U.S. 1033 (1973); see also *Graham*, 490 U.S. at 396-397 (noting, with regard to an analogous claim under the Fourth Amendment, that "[t]he calculus * * * must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation").

The use of force by prison guards on an individual basis typically involves consideration, admittedly in a less urgent context, of the security concerns at issue in *Whitley*. We believe that in determining whether such actions are unnecessary and wanton, courts should be guided, as in *Whitley*, by the factors articulated by Judge Friendly in *Johnson* v. *Glick*, *supra*. Those factors include

> the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Glick, 481 F.2d at 1033; see *Whitley*, 475 U.S. at 321.[2] These factors themselves do not provide "some talismanic formula" for deciding cases; but they provide a list of inquiries that should in most cases help to "focus on the central inquiry * * *, which is whether the particular use of force amounts to the 'unnecessary and wanton infliction of pain.'" *Graham*, 490 U.S. at 398 n.11.

Application of these factors to this case shows that respondents inflicted an unnecessary and wanton beating on petitioner. The key facts here are that petitioner was in shackles and handcuffs when he was beaten, and the guards did not contend that he was resisting their efforts to move him to another cell.[3]

[2] Judge Friendly articulated these factors in the course of suggesting that the constitutional standard for evaluating prison beatings was a substantive due process standard drawn from *Rochin* v. *California*, 342 U.S. 165 (1952), an approach this Court subsequently has discredited, see *Graham* v. *Connor*, 490 U.S. 386, 392-394 (1989). Nevertheless, as the opinion in *Whitley* demonstrates, the factors Judge Friendly articulated are useful in determining whether the force applied by prison guards represented a legitimate response to prison management concerns, as opposed to an "unnecessary and wanton infliction of pain."

[3] The guards did not offer any justification for their use of force. To the contrary, Woods "denied that he used any force whatsoever" against petitioner. J.A. 24. The magistrate refused to credit that testimony, and instead found that "Woods and McMillian used force on the plaintiff when there was no need to use any force at all, and that Mezo expressly condoned the use of force in this instance," J.A. 26.

In these circumstances—even giving due deference to the concerns respondents may have had in attempting promptly to defuse what may have seemed a tense situation—it is difficult to conclude that there was any need for respondents to apply any considerable amount of force. Although the injuries sustained by petitioner were not particularly serious, they undoubtedly were painful. In addition, it strains credulity to find that they were necessary, when the factual findings below suggest no reason for the use of force. This case would likely be different if the blows were sustained by a prisoner who was not yet shackled and was resisting the efforts of guards to remove him from his cell, or if it were apparent from the record that the restraints were inadequate to prevent petitioner from engaging in disruptive behavior while the guards were trying to move him; in those scenarios, the use of force by the guards could well be grounded in legitimate security concerns. But on the facts as found below, it is clear that respondents unnecessarily and wantonly beat petitioner.

B. The Court Of Appeals Erred By Applying A "Significant Injury" Requirement

The court of appeals did not disagree with the conclusion that respondents' actions were unnecessary and wanton; indeed, it said that "[t]he conduct of McMillian and Woods qualified as clearly excessive and occasioned unnecessary and wanton infliction of pain." J.A. 32. But the court imposed a threshold requirement that prisoners establish that an alleged

beating caused a "significant injury." *Ibid.*[4] The court did not elaborate on the "significant injury" requirement, but held that petitioner's injuries were not significant because the magistrate described them "as 'minor' and noted that they 'required no medical attention.'" J.A. 33. This threshold requirement directly conflicts with the test this Court consistently has applied to Eighth Amendment challenges to actions by prison officials, which focuses on the "unnecessary and wanton infliction of pain," not the unnessary and wanton infliction of "significant injuries." [5]

The test applied by the court of appeals would shield any type of punishment, however torturous, that does not cause a visible and lasting injury. Examples of such punishments may be found in this Court's opinions, such as *Hutto* v. *Finney*, 437 U.S. 678 (1978), where this Court discussed the so-called Tucker telephone, "a hand-cranked device * * * used to administer electrical shocks to various sensitive parts of an inmate's body." *Id.* at 682 n.5. As Judge

[4] Aside from this requirement—the first of the four elements identified by the court of appeals—the test applied below is not dramatically different from the "unnecessary and wanton infliction of pain" test applied by this Court. That phrase is the fourth factor in the court of appeals' test, and the second and third factors—which require that excessive and objectively unreasonable force caused the injury—may be viewed as attempts (similar to the *Johnson* v. *Glick* factors described above) to focus the inquiry on what types of activity are "unnecessary and wanton."

[5] We note that this Court regularly has applied the Eighth Amendment to sentences that would not have involved any significant physical injury. *E.g.*, *Weems* v. *United States*, 217 U.S. 349 (1910) (cadena temporal, which involved prolonged shackling and forfeiture of civil rights); *Trop* v. *Dulles*, 356 U.S. 86 (1958) (forfeiture of citizenship).

Easterbrook recognized for a panel of the Seventh Circuit, it would be unthinkable for our society to accept a rule that leaves the state "free to inflict such pains without cause just so long as it is careful to leave no marks." *Williams* v. *Boles*, 841 F.2d 181, 183 (1988).

It is, of course, unlikely that the court of appeals adopted the "significant injury" requirement in order to exclude from scrutiny truly torturous punishments that "leave no marks." Rather, it is more likely that the court of appeals was motivated by a sound concern with baseless allegations by prisoners of beatings by prison guards. The "significant injury" requirement would allow district courts to dispose of most of the frivolous cases on motions for summary judgment, protecting prison guards from the necessity of standing trial. The problem with this test, though, as outlined above, is that the "significant injury" requirement will dispose not only of frivolous cases, but also of meritorious ones.

We believe the better approach is to apply the test this Court has regularly employed in Eighth Amendment cases challenging actions taken by prison officials, which focuses on whether there was an "unnecessary and wanton infliction of *pain*." See *McHenry* v. *Chadwick*, 896 F.2d 184, 187 (6th Cir. 1990) (rejecting the "significant injury" test). In applying this Court's test in a manner that adequately protects prison employees, it is necessary to recognize, as Judge Friendly noted in *Johnson* v. *Glick*, that "[n]ot every push or shove * * * violates a prisoner's constitutional rights," 481 F.2d at 1033. In all but the most unusual cases, force that is sufficient to constitute "unnecessary and wanton infliction of pain" will produce some significant and objectively demon-

strable physical harm, whether it be substantial bruising, burns, wounds, or broken bones. Lesser injuries generally should be considered beneath constitutional concern, under the principle that *de minimis non curat lex*. See, *e.g.*, *Parratt* v. *Taylor*, 451 U.S. 527, 545 (1981) (Stewart, J., concurring) (rejecting a claim that would "trivialize * * * the meaning and intent of the Constitution"). Thus, in most cases of this sort prison guards should not have to stand trial to defend themselves against fabricated allegations, because there will be some objective evidence that an incident occurred. But any test must leave open the possibility that a prisoner can show that prison officials unnecessarily and wantonly inflicted considerable pain, even if the incident did not cause significant and objectively demonstrable physical harm. In short, the court of appeals erred by adopting a rule that appears to insulate any infliction of pain that does not "require medical attention," J.A. 33.

Application of the appropriate rule to this case is straightforward. First, the physical injuries suffered by petitioner constitute a significant and objectively demonstrable physical harm sufficient to establish that an incident occurred. Second, in our judgment the beating the magistrate found respondents inflicted on petitioner is more than sufficient to establish the infliction of "pain" cognizable under the Eighth Amendment, so that petitioner should recover if the "pain" was inflicted unnecessarily and wantonly.

* * * * *

Because it is clear that respondents unnecessarily and wantonly beat petitioner, and because in our view the beating was sufficiently serious to be cognizable

under the Eighth Amendment, the damages awarded by the district court should be reinstated.[6]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1991

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[6] Because neither court below applied the correct test to evaluate the seriousness of the beating inflicted on petitioner, this Court may wish to remand the case to the court of appeals for application of the appropriate test in light of the entire record.

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No. 90-6531

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1990

KEITH HUDSON,
Petitioner,

— against —

JACK McMILLIAN, *et al,*
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS,
FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN SUPPORT OF THE REVERSAL OF THE FIFTH CIRCUIT.

(List of Counsel on Inside Front Cover)

13pp

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BRIEF AMICUS CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN SUPPORT OF THE REVERSAL OF THE FIFTH CIRCUIT.

BRIEF AMICUS CURIAE

This brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner and the Respondents. Letters of Consent of all parties have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF AMICUS

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has published since 1975 the "*Jail and Prisoner Law Bulletin,*" a national case law reporter on prisoners' issues, and has sponsored national seminars on Jail Legal Issues since 1977. These seminars use as speakers both plaintiff and defense counsel, as well as representatives of the American Civil Liberties Union, National Prison Project.

AELE has previously appeared as *amicus curiae* over eighty times in the Supreme Court of the United States and over thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

ARGUMENT

I.

THE FIFTH CIRCUIT'S "SUBSTANTIAL INJURY" RULE IS TOO RESTRICTIVE, AND IMPEDES AN IMPORTANT PURPOSE OF SECTION 1983, TO DISCOURAGE EXCESSIVE FORCE BY LAW ENFORCEMENT AND CORRECTIONAL OFFICERS. THIS COURT SHOULD ESTABLISH A GUIDELINE WHICH REJECTS PETTY COMPLAINTS, BUT PROVIDES REDRESS FOR ESCALATED VIOLENCE.

Amicus, through its educational seminars and publications, stresses the interplay between instilling professional behavior and the legal responsibility for misconduct imposed by 42 U.S.C. Section 1983 litigation. While we deplore false allegations and the many frivolous suits filed by often bored and frequently malicious inmates, we recognize that damage actions brought in federal court are a powerful deterrent to misbehavior by state and local law enforcement and correctional personnel.

The dilemma for this Court is to set guidelines which reject petty disputes, which should not be litigated in a federal forum, while assuring victims of police or correctional brutality of an impartial arena to redress their more serious complaints.

We agree with the statement in *Johnson v. Glick*, 481 F.2d 1028 (2nd Cir. 1973), *cert. den.*, 414 U.S. 1033, 94 S.Ct. 462, that "not every push and shove" or unwarranted slap in the face should be a *federal* civil rights violation. However, there is a large, definable and intermediate step between a shove and a broken bone. It includes the gratuitous kick or punch delivered as punishment. The aftermath of pain may only be a bruise and not a splint, cast, or stitches. Nevertheless, an inmate has "a constitutional right to be free of unprovoked physical assault by agents of the state while in state custody." *Runnels v. Rosendale*, 499 F.2d 733 (9th Cir. 1974).

Law enforcement and correctional officers know the difference between the shove and a kick, or between a slap and a closed-fist punch, as surely as they know the difference between reasonable force and unnecessary punishment. They also know in the Fifth Circuit, how far they can go in abusing a prisoner before they will be held accountable, whether it be in a courtroom or disciplinary setting.

Amicus believes that the so-called "blood and guts" guidepost used to initiate criminal proceedings under 18 U.S. C. Section 242 is too high a threshold for civil actions. Administrative policies and disciplinary rules, however detailed, stimulating, and well-intended, alone cannot prevent officer brutality.

Professional law enforcement and penal administrators need the added support provided by the civil rights laws, and enforced by the courts, to deter the human urge to inflict physical punishment on a misbehaving prisoner. Simply stated, the Fifth Circuit has sent the wrong message to entry-level correctional officers.

In *Johnson v. Morel,* 876 F.2d 477 (5th Cir. 1989), the court below held that an arrestee's civil rights are violated only if *significant injury* resulted from the officer's use of force. This holding was recently reaffirmed in *Hulsey v. State of Texas,* 929 F.2d 168 (5th Cir. 1991); see also *Huguet v. Barnett,* 900 F.2d 838 (5th Cir. 1990). The Fifth Circuit has thus applied its significant injury to all excessive force claims.

Other circuits have wisely rejected this criteria: *McHenry v. Chadwick,* 896 F.2d 184 (6th Cir. 1990); *Jackson v. Crews,* 873 F.2d 1105 (8th Cir. 1989); *Calamia v. City of New York,* 879 F.2d 1025 (2nd Cir. 1989); *Walmsley v. City of Philadelphia,* 872 F.2d 546 (3rd Cir. 1989). The Sixth Circuit has also held that the more unreasonable the use of force, the less severe an injury is needed to state a claim; *Molton v. City of Cleveland,* 839 F.2d 240 (6th Cir. 1988).

While the parties contest the facts and their evidentiary weight, the Magistrate Judge and the Fifth Circuit panel found the force used was unnecessary and that the plaintiff suffered physical injuries, though minor. The panel consid-

ered it to be a "blight" without a remedy and expressed the hope that ". . . someday this blight on our criminal justice system will be forever removed . . ." Unpublished *per curiam* opinion of July 31, 1990 at 3.

We believe that the threat of civil suit in state courts is often an inadequate deterrent to officer misconduct. There are significant impediments which include notice of claim requirements, limitations on damage awards, various statutory immunities, and shortened statutes of limitations. More important are the practical and political realities of an elected judge and a county-selected jury not wanting to penalize law enforcement and correctional officers who reside in their communities. See Geller, *Police Leadership in America* at 227, American Bar Foundation (Chicago: 1985).

II.

COURTS SHOULD DISTINGUISH BETWEEN FORCE REASONABLY BELIEVED TO BE NECESSARY TO OVERCOME RESISTANCE AND THAT WHICH IS INFLICTED AS PUNISHMENT. IN THE FORMER INSTANCE, OFFICERS SHOULD BE ALLOWED A WIDE LATITUDE OF DISCRETION; IN THE LATTER, LITTLE DISCRETION SHOULD BE ALLOWED.

Police officers and correctional personnel are often required to use force to subdue prisoners. They are taught a use-of-force progression, from verbal and hand-hold compliance at the lowest levels, to the baton, carotid hold, and other potentially lethal maneuvers at the highest levels.

There are dozens of professional "use-of-force experts," many of whom spend large sums advertising in advocacy journals. When in court, they confidently identify the amount of force needed to subdue a person, often with amazing and

self-serving precision. Most juries, we believe, recognize the impreciseness and dynamics of a violent confrontation. During jury deliberations, officers usually are allowed the necessary latitude to justify their actions.

When, however, force is gratuitously inflicted to cause punishment, jurors are apt to make a different judgment. While they may be repulsed by the criminal and his violence, we believe most jurors demand, as well as most police chiefs, sheriffs, and wardens expect, that officers will restrain their rage and contain their human instincts to summarily punish an offender.

Accepting the Magistrate's findings as we must, the force used in this case exceeds generally accepted professional standards. "In no event is physical force justifiable as punishment." Mandatory Standard 3-4198, *Standards For Adult Correctional Institutions,* Third Edition, American Correctional Association (A.C.A.) in cooperation with the Commission on Accreditation for Corrections (January 1990), p. 64.

The A.C.A. Standards contemplate, and correctional officers recognize, a difference between force used to subdue a prisoner and that which is employed to punish him. The force used to seize a person is judicially measured by the Fourth Amendment test of objective reasonableness; *Graham v. Connor,* 490 U.S. 386 (1989).

We suggest that when force is used for no apparent purpose other than to punish a prisoner, the remedies available under the Eighth Amendment should respond to the practical need to deter and punish officer misconduct. The Magistrate Judge accomplished this objective with his verdict; the Court of Appeals did not, when it chose to deny the plaintiff an adequate remedy.

CONCLUSION

The legal right to use force carries a grave responsibility. Correctional and law enforcement executives must provide extensive training and guidance to their subordinates. The public has a right to expect that the force used by peace officers is carefully regulated by their superiors. The availability of employee disciplinary mechanisms is simply not enough; judicial sanctions are necessary.

We believe the right to be free from officer-imposed physical abuse is of constitutional dimension. The constitution, the civil rights acts, and their application by the courts clearly serve as beacons to guide criminal justice administrators in their development of internal policies and procedures. They also, by necessity, must deter their subordinates who could otherwise inflict painful but minor injuries without legal consequences.

The significant injury test presents the opportunity for abuse. Gratuitous force could be used so long as there are no broken bones or visible signs of injury. For these reasons, we respectfully urge this Court to reverse the Court of Appeals decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KEITH HUDSON,

Petitioner,

vs.

JACK McMILLIAN, MARVIN WOODS and ARTHUR MEZO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF PRISONERS' LEGAL SERVICES OF NEW YORK, IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Prisoners' Legal Services of New York ("PLS") is a not-for-profit corporation which provides legal services free of charge to indigent state prisoners who lack other counsel. The New York State prison system now confines over 56,000 individuals under sentence. PLS also provides such services to several hundred New York City prisoners. PLS' staff includes 32 attorneys. It was formed in 1976 in response to the 1971 Attica riot.

Throughout its history, PLS has handled Eighth Amendment excessive force cases. Its docket presently includes twenty-eight cases with such

claims.[1]

The outcome of the instant case may affect present and future cases of PLS clients. For example, in a case decided approximately two years ago, Judge Munson of the Northern District of New York awarded $12,300 to a PLS client for physical injuries and mental distress that resulted from a beating by prison guards, and reserved on punitive damages.[2]

The Court found that the prisoner, John Hayden, was punched and kicked because he "badgered" a guard about another inmate's request to go to a movie being shown in the prison. Judge Munson found Hayden suffered seven bangs and bruises and a retinal hemorrhage which eventually resolved itself, but no permanent injuries. The judge also found Hayden suffered two spells of unconsciousness. His "spells" were episodes of anxiety neu-

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[1] Alexander v. Smith, No. 86-CV 701(C) (W.D.N.Y.)
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Sackett v. Dylag, No. 86-CV-644 (W.D.N.Y.) ($65,000 judgment for plaintiff entered May 10, 1991; motion for judgment n.o.v. pending)
Scott v. Coughlin, No. 87-CV-1340 (N.D.N.Y.)

[2] The parties later settled all plaintiffs' damage claims and their appeals for $24,600, plus certain interest.

rosis and hyperventilation syndrome. The first spell was triggered by fear during the beating, and the second by fear his attackers, guards who worked in his cellblock, would return. The only treatment Hayden received was Tylenol and Vizine. Hayden v. Maldonado, No. 82-CV-1166, Memorandum - Decision and Order (N.D.N.Y., March 24, 1989) 10,11,16-21. See Appendix A, A-44.

In a case like Hayden's, despite the physical pain, mental distress and unconsciousness, under the Fifth Circuit standard being reviewed here, there might be no "significant injury" and hence no liability. This could be so even though a beating was administered intentionally when there was absolutely no reason whatsoever to use force.

We will offer material

We will offer material primarily related to the New York State prison system, the second largest in the nation.

SUMMARY OF ARGUMENT

The unnecessary and wanton infliction of pain should remain the keystone of Eighth Amendment brutality law, and "significant injury" should not be added as a prerequisite to liability. Physical and mental pain can be severe enough that their unjustified infliction offends contemporary standards of decency. The terror a prison beating can inspire is heightened by the fact that the prisoner remains trapped in a closed society, at the mercy of its keepers.

We call the Court's attention to a videotape which we have

dent in a New York State prison which resulted in the federal criminal prosecution of two staff members. It illustrates our point about how severe the pain and terror of a prison beating can be. The conduct it depicts is contrary to contemporary standards of decency, regardless of whether the resulting injuries require short term treatment or are permanent.

The appropriate standard in cases such as those on the videotape and Hudson's is the "unnecessary and wanton infliction of pain." While not every push or shove violates the Constitution, where no force is necessary, no deference is due the need to make spilt-second decisions. Hence, the "malicious and sadistic" standard is inappropriate in these cases.

In Hudson's case, the guards' conduct violated prison order

and security. Prison systems have a strong interest in preventing such guard conduct. The spark for the 1971 Attica riot was an incident in which inmates believed two of their fellows were beaten while being taken to disciplinary housing, in part because that is what they had come to expect. Beatings without justification do not teach inmates anything positive about how to conduct themselves, and are contrary to the State's interest in rehabilitation.

The Commissioner of New York State's prison system has frankly acknowledged a brutality problem. A "significant injury" requirement would complicate the state's task of operating safe and orderly prisons.

Grossly inhumane practices once common in our prisons, the like of which have occurred in New York State in the past two decades, may not

create "significant injury." Adding a "significant injury" requirement would remove the Eighth Amendment as a barrier to practices which should be relegated to our past.

Contrary to respondents' suggestion, adding a "significant injury" requirement will not reduce factual disputes. Other means, such as use of video cameras, are better suited for that purpose. Such a requirement would, however, increase the importance of prison medical records.

Unlike free world medical records, prison medical records are created in an atmosphere where neither patient nor provider is necessarily free from coercion and intimidation. New York State prison officials have described a brutally-enforced "code of silence." Prison records may be altered or destroyed to cover wrong-doing. Whether inmates even see medical personnel after a beating may depend on the beaters or their friends.

Prison records are often sloppily written, and the examinations are far from ideal. For example, in Attica, physical assessments on admission to disciplinary housing last 10-28 seconds. Brutality complaints often arise from events just prior to such admissions.

Moreover, prisoners generally can turn to no one other than those provided by their keepers for documentation of their injuries. Making even liability, not just damages, more dependent on prison medical records will not contribute to fairness.

Finally, if Eighth Amendment liability is made to turn more on whether injuries are treated, a

disincentive to treat will be created. Likewise, conduct which can have very serious consequences will be encouraged. For example, the Fifth Circuit appears to have held that choking an inmate unconscious does not in itself violate the Eighth Amendment. Recently, two inmates in this State died from such force.

The decision of the Court of Appeals requiring proof of "significant injury" in Eighth Amendment cases should be vacated, and the judgment of the District Court reinstated.

POINT I

THE UNNECESSARY AND WANTON INFLICTION OF PAIN, NOT SIGNIFICANT INJURY, SHOULD BE THE KEY TO EIGHTH AMENDMENT LIABILITY IN BRUTALITY CASES.

As petitioner Hudson argues, it is the unnecessary and wanton infliction of pain that should remain

the keystone of Eighth Amendment brutality law, and "significant injury" should not be added as a prerequisite. Where there is no need for force, as in Hudson's case, injury beyond de minimis should create liability. Pain, physical and/or mental, can be great enough to contravene contemporary standards of decency if inflicted without justification, even in the absence of "significant injury."

We have lodged with the Clerk as Appendix B to this brief a videotape of a prison incident[3] which

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[3] The incident occurred July 5, 1980 at Clinton Correctional Facility, Dannemora, NY, 12929, which retains the original tape. The tape shows areas inside the Special Housing Unit, or disciplinary housing. The incident began as the inmate was taken out of his cell; the tape probably does not show all the force used on the inmate. The rapid switches in scene occur as the video system operator switches through various cameras. The lack of sound in part of the tape is so in the original. Parts of the tape were broadcast on NBC news nationally and on the local television news in Albany and Plattsburgh, N.Y., in April, 1982.

videotape of a prison incident[3] which provoked the federal criminal prosecution of a prison guard and a sergeant.[4] We call particular attention to the first three minutes and a couple of

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[3] The incident occurred July 5, 1980 at Clinton Correctional Facility, Dannemora, NY, 12929, which retains the original tape. The tape shows areas inside the Special Housing Unit, or disciplinary housing. The incident began as the inmate was taken out of his cell; the tape probably does not show all the force used on the inmate. The rapid switches in scene occur as the video system operator switches through various cameras. The lack of sound in part of the tape is so in the original. Parts of the tape were broadcast on NBC news nationally and on the local television news in Albany and Plattsburgh, N.Y., in April, 1982.

[4] They were indicted and tried for violating the inmate's constitutional rights. Pretrial matters produced two reported opinions: United States v. Pageau, 526 F.Supp. 1221 (N.D.N.Y. 1981) (tape admissible), and 535 F.Supp. 1031 (N.D.N.Y. 1982), (media may copy tape). The first trial resulted in a mistrial. The indictments were later dismissed in exchange for the defendants' accepting administrative penalties of a month's suspension without pay (almost double the potential criminal fines) and a year's assignment away from inmate contact. See Ottaway News Service story, "Guards' Plea Bargain Brings Dismissal of Charges," carried in Plattsburgh Press-Republican, June 8, 1982, p. 1, col. 1. We refer to press accounts because almost no portion of either trial was transcribed.

provocation.[5] The sergeant does not stop the kicks and blows, and actually appears to join in. Although the situation is not identical to Hudson's, the similarities are substantial.[6]

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[5] One of the press descriptions of the tape says:

> One of the . . . guards has a club approximately two feet long, and is seen delivering at least half a dozen blows at the man on the ground. . . . The man on the ground screamed, "Go ahead, kill me, kill me, you (expletive), go ahead, kill me.". . . One of the guards responded, "I will, I will. I'd love nothing better. . . . Give me an excuse . . ." The guard repeated, "give me an excuse" about half a dozen times.

Another story adds, "[g]ive me an excuse, you slant-eyed (expletive)." Ottaway News Service stories, "Judge to Rule Today on Use of Video-Tapes in Trial" and "Alleged Victim a No-Show, Prosecution Rests," carried by Plattsburgh Press-Republican, October 21, 1981, p. 5, col. 1, and June 5, 1982, p. 5 , col. 1, respectively. Note the dialogue at about 8:34 on the clock counter.

[6] According to prisoner records and press accounts of the evidence, John Eng had many contusions and abrasions, cuts requiring stitches in his head and thigh, and a fracture of a small bone just above the knuckle of his little finger, which was splinted. He was hospitalized for two days. Ottaway News Service stories, "Trial Opens in Case of Beaten Prison Inmate," "2 Prison Guards Face Second Trial Starting Today," and "Rights of

(continued...)

Although the incident started when Eng, upon leaving his cell, grabbed the officer by the throat, Judge Miner, then of the Northern District of New York, framed the issue in the federal prosecution of the guard and sergeant as one "of intentional use of excessive and unnecessary force" since the tape depicts "defendant Pageau striking the inmate a number of times with his nightstick and also depicts defendant Welch kicking the inmate on one or more occasions." United States v. Pageau, 535 F.Supp. 1031, 1033, n.3, (N.D.N.Y. 1982).

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[6](...continued)

Inmates, Prison Guards, Being Weighed at Trial in Albany," run by Plattsburgh Press-Republican, February 11, 1982, p. 5, col. 7, June 3, 1982, p. 5, col. 1, and June 4, 1982, p. 5, col. 1, respectively. While inmate Eng clearly had "significant injuries," conduct such as that on the videotape should not be made constitutional by the subtraction of a couple of the most damaging kicks or clubbings.

In thinking about the terror a prison beating can inspire, it is necessary to remember that prisoners are cut off from the world, and often left at the mercy of their keepers. Prison beatings occur out of public view. Very few beatings are on videotape. We offer the Eng videotape to show how much pain and terror can be involved. We submit that the media interest in the tape in 1982 (see footnotes 3 and 4), like the media interest in the video of the police handling of Rodney King in Los Angeles, was due to the fact that conduct, like that seen on the Eng videotape, greatly offends contemporary standards of decency, whether or not it causes "significant injury." Estelle v. Gamble, 429 U.S. 97, 103 (1976).

POINT II

THE PRESENT CASE EXEMPLIFIES THOSE WHERE AN "UNNECESSARY AND WANTON" STANDARD, RATHER THAN A "MALICIOUS AND SADISTIC" STANDARD, IS APPROPRIATE.

This Court has ensured that prison authorities have wide latitude to maintain prison order and discipline. See, e.g., Hewitt v. Helms, 459 U.S. 460, 470, 472 (1983). That latitude should not extend to the use of force to inflict pain when there is no legitimate occasion for the use of force.

There are occasions during disturbances when prison authorities must make split-second decisions on the use of force, and where hindsight is less important than "the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials." Whitley v. Albers, 475 U.S. 312, 321

(1986). In such circumstances, Whitley teaches that a "malicious and sadistic" standard is a fitting measure of the basic constitutional test of "unnecessary and wanton infliction of pain." Id. at 320-321.

However, there are cases, such as Hudson's, when force is not applied as a "prophylactic or preventive measure intended to reduce . . . breaches of prison discipline." Whitley, 475 U.S. at 322. In such cases, a standard of simply "unnecessary and wanton infliction of pain," Whitley, 475 U.S. at 320, is appropriate, even though "[n]ot every push or shove . . . violates a prisoner's constitutional rights." Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), cert. denied, 414 U.S. 1033 (1973).

POINT III

WHEN GUARDS BREACH PRISON DISCIPLINE BY NEEDLESSLY BEATING INMATES, THEY UNDERMINE THE STATE'S INTERESTS IN SECURITY, ORDER AND REHABILITATION, AND ENDANGER ALL THOSE WITHIN PRISON WALLS.

States have a strong interest in preventing their prison staffs from needlessly beating inmates. Louisiana[7], like New York[8], has rules against the conduct found by the Magistrate in the instant case to be unconstitutional. It is more than ironic that the Louisiana Attorney General is before this Court arguing that such conduct should be constitutional.

Just as civil disturbances can be triggered by police mis-

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[7] In the instant case, Officer James Cole testified that an officer who abuses an inmate is subject to disciplinary action and probably discharge. Magistrate's opinion, p. 6, Joint Appendix at 23.

[8] The disciplinary charges against the guard and sergeant in the Eng incident were of this nature. See footnote 4. The New York statute and administrative rules are quoted Appendix D.

handling of citizens, prison disturbances can be triggered by "a random incident that gets out of control and sows the seeds of discontent in an inmate population," such as one when "a staff member momentarily loses self-control and hits an inmate." American Correctional Association, Riots and Disturbances in Correctional Institutions 19 (3d ed., 1990). Therefore, Corrections Officers must be extremely careful when subduing a violent prisoner in front of other inmates. "If the situation is not handled correctly, violence may spread." Nick Pappas, editor, The Jail: Its Operation and Management, United States Bureau of Prisons in cooperation with the University of Wisconsin, reprinted by the Department of the Navy, 1977, p. 83.

Even the New York State Department of Correctional Services be-

lieves this to be true. That department argued against the media's request to copy the "Eng videotape,"[9] because they felt that if their inmates were to view the tape on television, there would be "a very real and immediate risk of a violent disturbance." United States v. Pageau, 535 F.Supp. 1031, 1033 (N.D.N.Y. 1982) (quoting from affidavit of a Deputy Commissioner).

Any unnecessary violence seen or heard or discussed among prisoners is alarming. The spark for the 1971 Attica riot was a situation in which inmates believed two of their fellows had been beaten while being

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[9] The tape, discussed at pp. 5 and 11-15, was lodged with the Clerk as Appendix B to this brief. We have asked the Clerk to notify the New York State Department of Law if any media organization requests to copy the tape.

taken to disciplinary housing.[10] The rumor was based in part on their expectation that this would occur. Attica: The Official Report of the New York State Special Commission on Attica, 142-157 (1972).

The resentment which follows an unjustified beating hinders both rehabilitation and the maintenance of order and security. Unjustified punishment of any kind not only "generates hatred toward the keepers and the system which permits it," but also degrades "the punisher and the punished alike." Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir., 1968) (Blackmun, J.). In addition,

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[10] Hudson was also beaten while being taken to the "dungeon," with other inmates hearing the beating or seeing the results.

Magistrate's opinion 3-5 and 9, Joint Appendix 21, 22 and 25.

> Prisoners cannot be expected to control their behavior if jail personnel show by their attitudes and their behavior on the job that they themselves cannot maintain self-control.

Pappas, supra., 75.

Furthermore, the American Correctional Association's Manual of Correctional Standards, states that well run prisons allow force "only when necessary to protect one's self or others from injury, or to prevent escape, or serious injury to property" and allow only as "much force . . . as is necessary to control the person...." 416-17 (3d ed., 1966).[11]

There is no question that brutality occurs in New York State prisons. Thomas A. Coughlin, III, the present Commissioner, testified in 1984

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[11] See Appendix D for the relevant New York statute and administrative policy.

that he "had a problem . . . with Corrections Officers beating up inmates . . . [and] getting . . . adequate proof that could convict Corrections Officers of assault." Record of hearing before referee 28-29, Exhibit A to Brief for Respondent In the Matter of Brian F. Malone, 65 N.Y.2d 772, 482 N.E.2d 565, 492 N.Y.S.2d 947, (1985). Just four weeks ago, he testified that there still are a

> distinct number of individuals . . . who engage in racial misconduct and who, occasionally commit acts of violence against inmates....
>
> The challenge . . . is . . . to ascertain who these individuals are, to catch them committing an act of racism or brutality and then to impose the harshest disciplinary penalty the law will allow.

Testimony of Thomas A. Coughlin, III, before the New York State Black and Puerto Rican Legislative Caucus Committee on Criminal Justice, presented at

hearing on Use of Force and Deadly Force in New York State Correctional Facilities, June 12, 1991 (available from N.Y.S. Department of Correctional Services, Building 2, State Campus, Albany, NY 12226).

It does not serve any legitimate penological purpose to create further obstacles to the civil and criminal prosecution of correction officers who undermine the prison system through inappropriate and unjustified uses of force.

POINT IV

A "SIGNIFICANT INJURY" STANDARD WOULD LEGITIMIZE PRACTICES WHICH SHOULD BE RELEGATED TO OUR PAST.

Aside from physical brutality and the infliction of terror, other sorts of prisoner mistreatment are inconsistent with contemporary standards of decency, and hence ought to remain proscribed by the Eighth

Amendment. Estelle, 429 U.S. at 103. Some may not leave any discernible physical injury, "significant" or otherwise.

If the Eighth Amendment proscribes only "significant injury" as the Fifth Circuit uses the term, many of the following list of physical punishments could well be administered constitutionally:

> ...flogging, strapping, beating with fists or clubs, spraying with a stream of water, stringing up by the wrists, exposure to extremes of heat or cold or to electric shock, confinement in the stocks or in cramped sweatboxes, handcuffing to cell doors or posts, shackling so as to enforce cramped position or to cut off circulation, standing for excessive periods "on the line" or barrel-heads, painted circles, etc., deprivation of sufficient light, ventilation, food or exercise to maintain physical and mental health, forcing a prisoner to remain awake until he is mentally exhausted, etc.

This list was compiled by the American Correctional Association ("ACA"), which

apparently thought the listed practices likely enough as of 1966 to specify them as corporal punishments which "should never be used under any circumstances." American Correctional Association, Manual of Correctional Standards 416, 417 (3d ed., 1966).

Despite the fact that New York probably has one of the better run prison systems, we have seen in the past two decades not only beatings, but also some practices similar to those on the ACA list. Two such instances will be described in the subsequent paragraphs.

The first followed the retaking of Attica's D yard in 1971, where "not-too-disguised attempts were made to hit [inmates] in the genitalia" to get them to lie on the ground, according to a National Guard doctor. Suspected leaders of the riot were

marked with chalk Xs on their backs. Additionally,

> One large inmate, after he was stripped, was ordered to lie down on his back across a recreation table. A football was placed under his chin, and he was told he would be dead if the football fell. . . .
>
> Three or four inmates picked out as leaders were ordered to lie on their backs in A yard with their knees drawn up, and shotgun shells were balanced on their knees and chests. . . . [Other inmates] said some troopers and correction officers on A catwalk above them occasionally flipped down lighted cigarettes on them. Other peace officers spat down on them.[8]
>
> [8] The inmates' statements were corroborated by National Guardsmen . . . . In addition, a medical examination . . . noted multiple first degree burns on buttocks and other parts of the bodies of several inmates.

Attica: The Official Report of the New York State Special Commission on Attica, 429, 431, 435.

Furthermore,

> A guardsman carrying an inmate back to A block from

the hospital that afternoon testified: "I was assigned to one stretcher on which there was a large black man. There were gun wounds in his legs and rear end.

...

"A . . . [correction officer] came up to us and asked what was wrong with this particular prisoner, and I told him the inmate had gunshot wounds in the legs. My telling him seemingly went unnoticed. He told us to put the inmate down. [The man then] picked the head end of the stretcher up and dumped [the inmate] onto his feet. The [inmate] fell over onto his shoulder and really bounced off the floor. There was debris and slime water all over the floor.

"Then this non-uniformed man pulled out a Phillips screwdriver and [said to the inmate], who was lying on the floor on his back, 'If you don't get moving - if you don't get up on your feet you are going to get this right up your ass.' Then he did stick this man right in the anal area five or six times. And the prisoner, he didn't say a word, but just sort of [got up and] pushed with his legs toward the cellblock this man wanted him to go into . . . [T]he prison guards were standing around and seemingly not even noticing it.

Id, 436-437 (bracketed material is so in

original). The official report contains other lengthy accounts of gauntlets and beatings, including beatings of wounded inmates on stretchers, the routine racial abuse, etc... Id, 428-441, 452-453.[12]

The second incident occurred in 1981, following the negotiated resolution of a disturbance at the Westchester County Jail in which one staff member was slightly injured. State Correctional Emergency Response Teams had regained control of the jail. Senior state prison administrators and watchdog agency monitors were present. Nonetheless, the staff, some of whom were not wearing name tags and thus were difficult to identify, assembled all inmates at

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[12] See Al-Jundi v. Mancusi, 926 F.2d 235 (2d Cir. 1991), Al-Jundi v. Estate of Rockefeller, 885 F.2d 1060 (2d Cir. 1989), and Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971) for the history of the litigation about the retribution after the retaking of Attica.

aproximately 11:00 p.m.

> in the courtyard . . . without clothes or shoes, and their hands remained cuffed behind their backs. . . . Inmates were forced to stand in their position and remain silent. . . . At about 12 a.m. . . . the inmates were permitted to sit down, but a moment later were made to stand for the count. Many were able to sit only with the assistance of officers while others lay flat, apparently because of the discomfort experienced in trying to sit. . . .
>
> During the time they were in the yard, numerous inmates began to complain about the tightness of their handcuffs. They complained of numbness in their hands, and SCOC staff noted that in some cases, the flexicuffs had deeply indented the skin. . . . In a few cases, inmates apparently passed out.[13]

New York State Commission of Correction, Report of the Westchester County Jail Disturbance, July, 1981, 22-23 (available

[13] It is not surprising that the most widespread and well documented staff misbehavior occurs after disturbances, especially ones where staff is hurt. Both those who hurt staff and those who did not can become targets.

from N.Y.S. Commission of Correction, 60 South Pearl Street, Albany, NY 12207).[14]

The Fifth Circuit's "significant injury" standard would shield from Eighth Amendment scrutiny conduct which, according to the ACA, "should never be used under any circumstances." In the absence of what the Fifth Circuit considers "significant injury," these practices would be constitutional.

POINT V

REQUIRING "SIGNIFICANT INJURY" WILL NOT END FACTUAL DISPUTES, BUT WILL FOCUS INCREASED ATTENTION ON UNRELIABLE PRISON MEDICAL RECORDS.

Requiring "significant injury" will not end factual disputes in

[14] The state eventually settled 300 inmates' claims from this incident for $250,000. Allman v. Coughlin, No. 82-CV-1149 (GLG) (S.D.N.Y.).

prison brutality cases.[15] Courts are, after all, designed to resolve factual disputes. But requiring "significant injury" will focus more attention on

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[15] A useful way to cut down factual disputes is to use video cameras in locations which produce many brutality complaints. According to the Inspector General of the New York State Department of Correctional Services, installation of a closed-circuit television system in the disciplinary housing area of one New York State prison cut down brutality complaints by 95%. Expansion of such systems was recommended to Governor Cuomo by a state special commission. New York State Commission on Criminal Justice and the Use of Force, Report to the Governor 343, 355-357, n.23 at 365, and n.44 at 367 (1987). Four weeks ago, the Commissioner of New York's prison system stated:

> Videotaping . . . [is] an extremely important managerial tool. It is next to impossible for either an inmate or a staff member to argue that an incident which is depicted on videotape did not actually happen the way the videotape shows it to have happened.

Testimony of Thomas A. Coughlin, III, before the N.Y.S. Black and Puerto Rican Legislative Caucus Committee on Criminal Justice, 6, presented at hearing on Use of Force and Deadly Force in New York State Correctional Facilities, June 12, 1991 (available from N.Y.S. Department of Correctional Services, Building 2, State Campus, Albany, NY 12226).

Aside from New York State, at least Illinois uses video cameras in its prisons. See Freeman v. Franzen, 695 F.2d 485, 489 (7th Cir. 1982), cert. denied sub nom. Branche v. Freeman, 463 U.S. 1214 (1982).

prison medical records in establishing the extent of both injuries and liability.

Prison medical records are not like medical records in the free world. Neither the patient nor the medical provider is necessarily free from coercion and intimidation. Medical providers in the prison system are often far from detached recorders of truth. Additionally, prison medical records have been altered, concealed and destroyed to cover misconduct. In many instances, records are ineptly kept and examinations are conducted sloppily or under circumstances inimical to a thorough evaluation. See Todaro v. Ward, 431 F.Supp. 1129 (S.D.N.Y. 1977), aff'd 565 F.2d 48 (2d Cir. 1977).

Increased reliance on prison medical records will create added pressures for the under-recording of

injuries, and the destruction of records. The current Inspector General of the New York State Department of Correctional Services, Brian F. Malone, gave this account of an incident involving the use of force at a New York prison, in a June 8, 1983 letter to the Committee on Professional Standards:

> [C]ertain medical documents had been removed from an inmate's folder who had suffered a knee injury and a head wound. . . . [The] nurse who had treated this inmate on the date of the incident, and who, at the time of the interview, had secured other employment, [said that] an attempt had been made to alter the treatment records so that two separate medical procedures would be interpreted as one, thus obfuscating a period of time where excessive force was utilized, as well as documenting a false reason for the inmate's head wound.

The letter is Exhibit C to Respondent's Brief. In the Matter of Brian F. Malone, 65 N.Y.2d 772, 492 N.Y.S.2d 947, 482 N.E.2d, 565 (1985), aff'g, 105

A.D.2d 455, 480 N.Y.S. 2d 603 (3d Dep't 1984).

In In the Matter of Brian F. Malone, Malone, an attorney, faced misconduct charges stemming from his attempt in a brutality case to pierce the guards' "code of silence." He felt the "code" was facilitated by the joint representation by a union lawyer of both targets and potential staff informants in his investigations. Malone submitted the letter previously quoted to explain the impediments to his investigations. The record of testimony in Malone's case, reflected in the dissents in the Court of Appeals and Appellate Division, indicated a guard breaking the "code" would be rare and might well have reason to fear

physical retaliation.[16]

Where there is a brutally enforced "code of silence," medical personnel have reason to fear for their safety if they record injuries in a way which suggests guard brutality. The Guards who beat an inmate may be standing over the inmate and the medical provider during any examination. Aside

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[16] Ramon Rodriguez, Counsel for the Department of Correctional Services at the time of the events leading to the charges against Malone, testified:

> . . . [T]his was the first time in my memory . . we had a real live [uniformed] witness, who watched and saw brutality occur in one of our prisons. It is a very rare occurrence.
>
> . . . We were both very concerned . . . that Mr. Lewis [a guard who reported that three other guards had beaten an inmate without cause], who was in fear of his safety, would not want to testify. . . . [W]e spent a great deal of time trying to figure out how we could make it as safe as possible for Mr. Lewis because he was doing something . . . that would put him in a great deal of danger.

Record of hearing before referee 45, 47-48, 54-55, Exhibit A to Brief for Respondent In the Matter of Brian F. Malone, 65 N.Y.2d 772, 492 N.Y.S.2d 947, 482 N.E.2d 565 (1985).

from facing direct retaliation and harassment, medical providers could find themselves left in the lurch when needing security assistance from guards.

If they fear further mistreatment, brutalized inmates may be afraid to seek medical aid, or to say how they got their injuries. The latter is what the court concluded occurred in Hayden v. Maldonado, No. 82-CV-1166, Memorandum - Decision and Order (N.D.N.Y. March 24, 1989) 20-21. See Appendix, A-41.

Whether inmates will even see medical staff, and after what delay, may be up to the very people who used force, or their work mates. Hudson testified he repeatedly sought medical treatment, but to no avail. Magistrate's opinion 8, Joint Appendix 25. See, for example, Simpson v. Hines, 903 F.2d 400 (5th Cir. 1990),

where ten policemen and guards entered a cell to search one man. He was left dead on the floor, and although he was observed to be motionless twice in the next five hours, no medical help was called.

A striking example of under-recording of injuries in prison medical records comes from a PLS case, Young v. Napper, No. 86-CV-453 (N.D.N.Y.). Our client, Cedric Young, was involved in a series of incidents in which force was used on him on the morning of July 8, 1985. Photographs made by PLS the next day[17] and deposition exhibits 85 and 86, are in the appendix at C-9 and C-10. They show obvious swelling, bruising and abrasions on his face. The prison medical

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[17] Our clients are not often fortunate enough to be photographed by outsiders so soon after a beating.

records show he was seen by medical staff at 9 a.m., 9:30 a.m., 11:30 a.m., and 3:55 p.m. on the day of the incident, and 4:20 p.m. the next day, as well as at sick call on July 11, 17 and 18. The records note various injuries on his body, but there is not a word about facial injuries. Deposition exhibits at appendix, C-2 to C-8. The facial injuries shown in the photos may not qualify as "significant injuries," but excessive force producing them should not be constitutional, regardless.

Young's claim was settled for $12,000. Had it been tried, the factual disputes most likely would have included just what his injuries were and when he got them, as in any case where the adequacy of prison medical records is challenged.

The adequacy of medical

care for inmates in Attica's Special Housing Unit ("SHU") (disciplinary housing) is at issue in Eng v. Coughlin, No. 80-CV-385(T) (W.D.N.Y.). The medical care in such a setting is critical to documenting brutality, since many inmate complaints of brutality concern events which occurred just before or during their transfer to the SHU. This is logical, since inmates are moved to the SHU after they have had major difficulties with staff, and staff may still be angry at them during the transfer process.[18]

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[18] After taking testimony on a number of incidents at Attica, a state court judge found:

> . . . brutality has occurred when inmates are being transferred from General Population to the Special Housing Unit. . . . Apparently, it starts as an intimidation effort. . . . As could be expected, several times the intimidation escalated into much more serious matters. One man suffered a seriously broken leg and at least two others had cuts on their heads that required suturing.

(continued...)

In Eng, PLS sought a preliminary injunction when an inmate died following a violent confrontation with staff. The incident raised very serious questions about emergency care for inmates in Attica's SHU. The Court preliminarily ordered that all medical staff be periodically trained in (among other things) proper procedure in assessing an inmate's condition, the necessity of conducting a thorough personal examination when medically appropriate, and accurately and completely filling out ambulatory health records. A further hearing is set on

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[18](...continued)

> . . . The testimony further disclosed that on most occasions the Correction Officers had removed their name tags . . . This action on their part indicated that trouble was expected and they did not wish to be identified.

Matter of Ware v. Smith, Index No. 11, 186, Memorandum and Judgment 3-4 (Wyoming County Sup. Ct., December 30, 1983).

(among other things) the degree to which adequate medical examinations can be done through plexiglass attached to the fronts of cells, the proper scope of medical examination on admission to the SHU, the adequacy of medical records, the provision of Spanish interpreters in emergencies, and whether medical care is delayed or effectively denied in certain types of cases.

The Court noted that the inmates' expert had reviewed 17 medical files and found serious deficiencies in 12, and defendants' expert agreed there were deficiencies in eight. In one of those,

> . . . an inmate denied injury when he arrived at the SHU . . . and physical examination upon admittance consisted only of a "nude viewing." Raymond Rpt. at 19-20. Several hours later, however, the inmate complained to a CO that he could not move. Although the CO reported this to the RN on duty, she merely recommended that the CO administer

> Tylenol and did not come to the SHU to talk to or examine the inmate. An hour later, the CO observed the inmate lying motionless on the floor of his cell and again notified the nurse. This time, the nurse came to the SHU, and in her notes reported the inmate's complaints of pain and numbness in his extremities. Despite the potentially serious nature of the complaints, her only recorded physical assessment was "no visible injuries." Raymond Rpt. at 19-20; Hines Aff. ¶ 37(3). No further action appears to have been taken in this case.

Eng v. Coughlin, No. 80-CV-385(T), Decision and Order 2-3, 7, 12, 14, 16 and 17 (W.D.N.Y., November 5, 1990).

Additionally, a report of the inmates' expert which was before the Court provides:

> Many records . . . displayed absent, or inadequate physical examination. The substitution of visual inspection for physical examination is untenable. The subjective impression of a nurse or PA based on such visual inspection . . . represents an unacceptable level of access to meaningful medical intervention. . . . Simple and basic elements of physical examination can, and

must be performed in order to adequately assess the serious medical complaints of inmates.

. . .

Multiple instances of poor medical records and clinical charting practices were identified. Several charts were noted to have incomplete SOAP entries. . . . Some SOAP notes contained only an outline of the therapeutic **P**lan, without benefit of the **S**ubjective (inmate's stated complaint), **O**bjective (physical exam and diagnostic testing), or **A**ssessment (diagnostic impression). This practice causes future reviewers . . . to have to guess at these other components by virtue of the nature of the therapeutic plan.

Albert J. Raymond, M.D., Eng v. Coughlin, Attica Visit #2 - Case Reports 26-27 (9/6/90).[19]

The report also states:

> **Medical Screening of Inmates Transferred into the SHU:** . . . In a series of some fifteen consecutive videotaped screening exams . . . the longest examination performed lasted only 28 seconds,

[19] A typed version of an example is at appendix, C-4 to C-6. This form, the Ambulatory Health Record, is used in all New York State prisons.

> with five of the fifteen exams lasting less than 10 seconds. . . . Essentially a brief medical inventory of questions were asked by rote, and included in-quiries as to any injuries, medical problems, and medications, followed by the nude viewing and quick exit of the medical personnel from the scene.

Id, 29.

Exceedingly poor medical records were found at another New York State prison in Todaro v. Ward, 431 F. Supp. at 1145-46. In Dean v. Coughlin, 623 F. Supp. 392, 395 (S.D.N.Y. 1985), the dental system was found "defunct" as to routine care, in part because 300 inmate requests to see the dentist were stuffed into a gauze box and ignored. Similar findings are not uncommon.[20]

Elevating the importance

[20] See, e.g., Newman v. Alabama, 503 F.2d 1320, 1323 (5th Cir. 1974); Lightfoot v. Walker, 486 F.Supp. 504, 517 (S.D.Ill. 1980); LeMaire v. Maass, 745 F.Supp. 623, 633 (D.Or. 1990); Ruiz v. Estelle, 503 F.Supp. 1265, 1323 (S.D.Tex. 1980); Hoptowit v. Ray, 682 F.2d 1237, 1252-1253 (9th Cir. 1982).

of prison records is not fair, since inmates almost never have any choice of providers, and are almost always completely at the mercy of those who generate the documentation of their injuries. Contrary to what respondents appear to suggest, given that prison records may be so unreliable, adding a "significant injury" requirement will not reduce factual disputes. See Respondents' Brief in Opposition, p. 9.

POINT VI

REQUIRING "SIGNIFICANT INJURY" MAY DISCOURAGE NEEDED MEDICAL TREATMENT, AND ENCOURAGE VERY DANGEROUS CONDUCT BY GUARDS.

It appears that "significant injury" may be distinguished from "insignificant injury" by the fact of medical treatment. For example, cuts on an in-mate's finger which required sutures were "significant," while Hudson's bangs and bruises and fat lip

and loose teeth were not. Compare Adams v. Hansen, 906 F.2d 192 (5th Cir. 1990) with the Court of Appeals decision in the instant case, Joint Appendix 30-33.

If prison personnel become aware that, absent treatment, a prisoner's injuries may not support a claim of civil or criminal Eighth Amendment violation, a disincentive to provide treatment will be created. Medical personnel could be discouraged from treating, if they are friendly with or intimidated by guards, and guards could be discouraged from taking injured inmates to see medical staff.

Furthermore, the Fifth Circuit has permitted guards to endanger the lives of inmates without any fear of liability. For example, unconsciousness caused by a choke hold, absent "serious or permanent injury

stemming from his brief blackout," was held not a "significant injury" in Wesson v. Oglesby, 910 F.2d 278, 280, 283 (5th Cir. 1990). However, in New York, two state prison inmates have died in the last 32 months as a result of choke holds. In one case, the inmate died as a result of "homicidal sustained compression of the neck and chest." In the other case, the inmate died from "homicidal asphyxia - compression of the neck." The compression in both cases was applied by staff during struggles with the inmates.[21]

Finally, permitting the lack of medical treatment to determine "significant injury" will discourage

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[21] In the Matter of the Death of Darrel Booth, May 10, 1991, and In the Matter of the Death of Shelton Philpot, November 23, 1988 ("one or more . . . treatment assistants applied physical force to the neck of the deceased, resulting in traumatic compression of the neck and fatal asphyxia."), New York State Commission of Correction, 60 South Pearl Street, Albany, NY 12207.

civil and criminal enforcement of the Eighth Amendment. Tragic cases, caused by guards who "overdo it," may well become more numerous. As has been observed by the Eighth Circuit:

> Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous.
> . . . Where power to punish is granted to persons in lower levels of administrative authority there is an inherent and natural difficulty in enforcing the limitations of that power.

Jackson v. Bishop, 404 F.2d at 578 (concerning supposedly regulated "strapping").

Besides abuse, if unjustified force is permitted at all, it will not be long "before it gets out of hand and rises to dangerous proportions." American Correctional Association, Manual of Correctional Standards, 417 (3d ed., 1966). A state court judge found that is exactly what hap-

pened at Attica. Matter of Ware v. Smith, Index No. 11, 186, Memorandum and Judgment 3 (Wyoming County Sup. Ct., December 30, 1983).

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reversed and the judgment of the District Court reinstated.

New York, NY,
July 10, 1991

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APPENDICES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN HAYDEN,

Plaintiff,

v. 82-CV-1166

CORRECTIONS OFFICERS ARISTIDES MALDONADO and LARRY BROOKS,

Defendants.

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HOWARD G. MUNSON, J.

MEMORANDUM-DECISION AND ORDER

From August 11, 1986 to August 14, 1986 the court conducted a non-jury trial in this case at the United States Courthouse in Auburn, New York. The action is brought under 42 U.S.C. §§ 1983 and 1985. It involves the alleged beating of plaintiff, John Hayden, by corrections officers at Clinton Correctional Facility ("Clinton"), Dannemora, New York. Plaintiff claims that three corrections officers, defendants Maldonado, Brooks and a third unidentified officer, assaulted and injured him on May 24, 1981 in Clinton. The following constitutes this court's findings of fact and conclusions of law. See Fed. R. Civ. P. 52. Prior to setting forth the substantive findings and conclusions, the court will address five evidentiary questions left unresolved at trial.

I. Evidentiary Matters.

A. Unfair Surprise in Dr. Ecker's testimony.

At trial plaintiff presented an expert medical witness, Dr. Arthur Ecker. The doctor's testimony went beyond the letter that defendants were given on his proposed testimony. The letter stated that plaintiff's injuries were inconsistent with an epileptic seizure. The doctor, however, altered his opinion and testified at trial that plaintiff suffered from a hyperventilation syndrome and not from epilepsy. He changed his opinion subsequent to examining the plaintiff and

taking a history, all of which was done on the first day of trial.

At trial defense counsel objected to the doctor's testimony to the extent which it went beyond the notice which defendants were given.[1] While an objection was made, defense counsel did not seek a continuance. When unfair surprise is claimed, "the appropriate remedy is a continuance rather than rejection of the evidence." McCormick on Evidence 440 n.34 (E. Cleary 2d ed. 1972); see Outley v. City of New York, 837 F.2d 587, 590 (2d Cir. 1988) (citing Johnson v. H.K. Webster, Inc., 775 F.2d 1, 8 (1st Cir. 1985)). Fed. R. Civ. P. 15(b) supports the view

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1. Transcript ("Tr.") at 212

that continuance is the appropriate remedy to unfair surprise. Id. Additionally, in an effort to minimize the prejudice created by the unfair surprise, the court permitted Physician's Assistant Sorrell to sit in on Doctor Ecker's testimony. Finally, there is no evidence that the lack of notice in the change in Dr. Ecker's testimony stemmed from any willful conduct on the part of plaintiff's attorneys to gain a tactical advantage. See Escalera v. Coombe, 852 F.2d 45, 48 (2d Cir. 1988) (citing Taylor v. Illinois, 108 S. Ct. 646, 655-57 (1988)). The court therefore concludes that Dr. Ecker's testimony was properly admissible even to the extent with which it differed from his original opinion as shared with the defendants.

B. Evidence that defendant Maldonado filed a false report and exercised excessive force.

At trial plaintiff's counsel in his cross-examination of defendant Maldonado sought to elicit testimony and introduce documentary evidence for the purpose of attacking Maldonado's credibility. Specifically, counsel tried to prove that, subsequent to the occurrence which is the subject of this lawsuit, defendant Maldonado was disciplined and received a notice of dismissal for use of excessive force and filing a false report. The disciplinary charges and subsequent notice of dismissal related to an incident which occurred at Clinton on April 5, 1985. At trial, plaintiff's counsel questioned Maldonado regarding the charges and

sought to introduce documentary evidence on the issue. The court reserved decision on defense counsel's objections to the line of questioning and the introduction of documentary evidence.[2]

Counsel in part relies on Fed. R. Evid. 608(b) in seeking to have this evidence admitted.[3] As pertinent, Rule 608(b) provides that:

> Specific instances of conduct of a witness, for the purpose of attacking or supporting his credibility, other than a conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court be inquired into on cross-examination of the witness . . . concerning his character for truthfulness or untruthfulness. . . .

The Rule itself plainly states, and Second Circuit authority holds, that

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2. Plaintiff offered these documents as Exhibits 18, 19 and 20.

3. Plaintiff's Post-Trial Memorandum at 7.

credibility cannot be attacked through extrinsic evidence of specific instances of conduct. United States v. DiPaolo, 804 F.2d 225, 230 (2d Cir. 1986); United States v. Smith, 727 F.2d 214, 221 (2d Cir. 1984); United States v. Clemente, 640 F.2d 1069, 1083 (2d Cir.), cert. denied, 454 U.S. 820 (1981). Under Rule 608(b) Plaintiff's Exhibits 18,19, and 20 are inadmissible. However, cross-examination of Maldonado as to specific acts of conduct is permissible in the court's discretion. United States v. Weichert, 783 F.2d 23, 25 (2d Cir.), cert. denied, 479 U.S. 831 (1986). The court now concludes that it was proper for counsel to cross-examine Maldonado on the charge of filing a false report. See Fed. R. Evid. 608(b). The testimony

adduced through cross-examination showed that Maldonado was involved in an incident on April 5, 1985, that he got a notice of discipline concerning that incident, the notice of discipline sought his dismissal, that he appealed the Department of Correctional Service's ("DOCS") determination and that at the time of trial DOCS continued to seek Maldonado's dismissal, but the entire appeals process was not yet complete.[4] The testimony regarding the charges which was elicited on cross-examination, however, is too sketchy to be of assistance to a fact-finder. It is disjointed -- in part because of the frequent objections of defense counsel -- and not very informative. As a result, the

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4. Tr. at 451 and 460-67.

court will not consider the testimony regarding the charges. See Fed. R. Evid. 403.

Counsel offers a second reason for offering the testimony and documentary evidence of the disciplinary charges which were pending against Maldonado. Counsel asserts that the evidence should come in as to the state of mind of another defense witness, Nurse Dupra. In other words, the evidence is offered on the theory that Nurse Dupra was intimidated as a witness. She, however, denied knowledge of the charges pending against Maldonado.[5] The court will not infer, as plaintiff's counsel suggests, that despite her

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5. Tr. at 365-66.

denials, Nurse Dupra knew of the charges pending against Maldonado. Plaintiff offered no evidence to the effect that these charges had been brought to Nurse Dupra's attention. Even on this second basis, the court will not consider the evidence regarding Maldonado's disciplinary charges. See Fed. R. Evid. 403.

C. Rebuttal Testimony of Brian Malone.

Plaintiff offered in rebuttal the testimony of Brian Malone, the Inspector General of DOCS. His testimony centered around a code of silence which operates among some DOCS personnel. In reaching its conclusion, the court has not relied on this testimony. Therefore, the court need not rule on its admissibility.

D. Max Vidal's Statement.

In his post-trial papers, plaintiff seeks to strike certain testimony elicited on cross-examination from Max Vidal, plaintiff's corroborating witness. The testimony regarded a written statement he gave to Prisoners' Legal Services ("PLS"). Previously, on direct examination the document in question was not used to refresh Vidal's memory. See Fed. R. Evid. 612. Defense counsel did not insist on gaining the statement from the plaintiff.[6] Cf. United States v. Nobles, 422 U.S. 225 (1975) (holding that the prosecution is entitled to the portions of a written report referred to in the testimony of a defense investigator).

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6. Tr. at 191.

In response to defense counsel's questions on the statement given to PLS, Vidal stated that the statement was sworn to, that he did not recall what the statement said, but that he did know that it referred to "this case."[7] Subsequent to discussion at trial on the issue of admissibility of the testimony and the document, counsel for plaintiff withdrew his objection to defense counsel's inquiring into the statement's contents.[8] "In the situation where a party makes an objection, then decides to withdraw it, one may properly speak of the objection as having been waived." C. Wright & K. Graham, Federal Practice and Procedure:

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7. Tr. at 182

8. Tr. at 192.

Evidence § 5033 (1977); see United States v. Montemayor, 684 F.2d 1118, 1123 (5th Cir. 1982). The court concludes that the objection was waived.

Moreover, the testimony elicited regarding the statement did not breach any work-product privilege. Perhaps that is why plaintiff's counsel withdrew his objection. Vidal did not recall the contents of the statement. His testimony did not go to the mental processes of plaintiff's attorneys. See Nobles, 422 U.S. at 238; Hickman v. Taylor, 329 U.S. 495, 514 (1947). Inasmuch as this was testimony given at trial, it could not help defendants prepare for trial, Nobles, 422 U.S. at 248 (White, J., concurring), but could serve in "the search for truth."

Nobles, 422 U.S. at 232.

Finally, it is not at all clear whether plaintiff seeks to strike Vidal's testimony or avert production of the statement. It appears that the concerns of plaintiff's counsel rested with the statement itself. Counsel is worried that the court's decision might form a precedent under which PLS would have to provide to defendants the statements of the witnesses whom PLS has interviewed.[9] For instance, plaintiff's post-trial memorandum argument on this point is made under the heading, "Defendants Are Not Entitled To Max Vidal's Statement." Such an argument is inapposite since Vidal's statement was never

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9. See Tr. at 185.

offered into evidence nor provided to the defendants. For the foregoing reasons, the court will not strike the questions asked and answers given.

E. Vidal's Testimony Regarding Drug use.

Defense counsel cross-examined Vidal regarding his drug use in prison, as well as his being disciplined when drugs were found in his prison cell.[10] At trial, the court reserved decision on the admissibility of such evidence.[11] Defense counsel argued that the evidence was admissible to show Vidal's motive for testifying at trial.[12] The proper analysis for this argument is under Fed. R. Evid. 608 and

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10. Tr. at 194-97.

11. Tr. at 199.

12. Tr. at 195.

not under Rule 404(b) because "'[m]otive' in Rule 404(b) refers to influence over out-of-court acts." C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5240, 1988 Supp. at 422 (1978). The court concludes that the evidence of the disciplinary action was admissible. The fact that corrections officers found drugs in Vidal's cell could in some way impact on his desire to strike out in general at corrections officers. See C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5240, at 475 n.34 (1978) (prior crime can show bias of witness and the prejudice is less if the witness is not a party); cf. United States v. DeLeon, 498 F.2d 1327, 1332-33 (7th Cir. 1974) (evidence of prior crime

is admissible to show that the witness may be testifying in order to fend off any pending prosecution). The evidence of drug use is another matter. In and of itself it does not show a tendency for untruthfulness under Fed. R. Evid. 608(b). See Crimm v. Missouri Pacific R.R. Co., 750 F.2d 703, 707-08 (8th Cir. 1984); see also United States v. Noti, 731 F.2d 610, 612-13 (9th Cir. 1984). Therefore, the court rules inadmissible any testimony of Vidal's drug use.

II. The Injuries to John Hayden.

Neither side in this lawsuit disputes that plaintiff suffered injuries on May 24, 1981. A central issue in this case, though, is whether plaintiff's injuries resulted from a

seizure of some sort or from a beating. To this end the expert medical testimony elicited at trial is crucial. The interpretation of this testimony is the keystone of the court's opinion.

Four medical personnel testified at trial. They were Dr. Arthur Ecker, plaintiff's expert, Elberta Dupra, the nurse who first administered to plaintiff's injuries, Physician's Assistant James Sorrell, who conducted an examination of plaintiff on May 28, 1981, and Dr. Jerome Davis, defendants' expert, a neurologist who sees patient referrals at Clinton and who saw plaintiff on such a referral on or around May 28, 1981.[13]

Plaintiff's injuries are

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13. Tr. at 518.

enumerated in two entries on Exhibit 1-1 which is one page of plaintiff's health record kept at Clinton. The first entry is by Nurse Dupra and was made on May 24, 1981; it lists seven injuries. The second entry is by Sorrell and was made on May 28, 1981. This entry shows one additional injury which the nurse did not find. Plaintiff was injured as follows:

1) a three centimeter bruise on his left side, below the ribs;

2) a black and blue left eyelid;

3) a four inch bruise on his upper left thigh;

4 and 5) reddened areas on both sides of the neck;

6) reddened areas on the

upper chest;

7) small abrasion on the top of the head;

8) and a small hemorrhage in the right retina.

Plaintiff's expert, Dr. Ecker, testified that in his opinion, these injuries did not stem from a seizure of any sort,[14] rather the injuries were consistent with a beating.[15]

Dr. Ecker explained the basis for his medical judgment. As an initial matter, he stated that in his opinion plaintiff does not suffer from epilepsy as defendants suggest. Instead, according to Dr. Ecker, plaintiff suffers from hyperventilation

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14. Tr. at 264-65 and 269.

15. Tr. at 265.

syndrome.[16] The hyperventilation syndrome accompanies an anxiety neurosis.[17] The episodes resulting from this condition start when plaintiff is in a state of fear. The fear leads to muscular tremors, shaking and hard breathing. In the more severe episodes, the sufferer of anxiety neurosis can lose consciousness.[18] Plaintiff himself testified that he suffered from "nervous spells."[19] He stated that he could feel one of these attacks coming on and he would then lay down.[20]

The doctor cited a number of factors which led him to the conclu-

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16. Tr. at 233.
17. Tr. at 223.
18. Tr. at 223-24.
19. Tr. at 20.
20. Id.

sion that plaintiff does not suffer from epilepsy. First, he satisfied himself that during an attack plaintiff bites his tongue deliberately and not involuntarily.[21] The doctor concluded this because there is no scarring of the tongue. Additionally, plaintiff has never wet himself when he has had an "episode." In contrast, it is frequently the case that sufferers of grand mal epilepsy do wet themselves during seizures.[22] Other considerations also influenced Dr. Ecker's opinion. Plaintiff's brain is not scarred. While one recording of plaintiff's brain waves was borderline, the one Dr. Ecker took was normal. Finally, there was no evidence

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21. Tr. at 226.
22. Tr. at 229.

that the medication given plaintiff for his epilepsy -- dilantin and phenobarbital -- reduced the frequency of plaintiff's "episodes."[23]

The relevance of the testimony regarding whether plaintiff suffered from epilepsy or hyperventilation syndrome is the severity of plaintiff's "episodes." Dr. Davis, the defense expert, testified that he has seen someone who has suffered a broken back from an epileptic seizure.[24] In comparison, the tenor of Dr. Ecker's testimony is that hyperventilation syndrome does not jerk the body as violently as a grand mal epileptic seizure.

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23. Tr. at 21-22 (Hayden); Tr at 234-35 (Ecker).

24. Tr. at 236.

As noted, Dr. Ecker's opinion is that plaintiff's injuries did not come from an episode of hyperventilation syndrome. He also stated that the injuries could not have come from an epileptic seizure.[25] As a basis for these conclusions, the doctor noted that plaintiff was injured on both sides of his neck. He also suffered injuries to both eyes. The eyes and the neck are protected areas and are less prone to injury than are more exposed parts of the body. For that reason alone, Dr. Ecker explained, it is unlikely that plaintiff received his injuries from a hyperventilation episode, or even from an epileptic seizure.[26] In addition,

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25. Tr. at 265.

26. Tr. at 269.

the very nature of seizures diminishes the possibility of receiving the injuries in such a manner. According to Dr. Ecker, the head moves up and down in any kind of seizure.[27] As a result, Dr. Ecker did not see how plaintiff could have suffered injuries on both sides of the neck from a seizure or hyperventilation "episode."[28] His opinion remained unchanged even in light of the possibility that plaintiff somehow injured himself on objects in his cell.[29]

The court observed Dr. Ecker to be a thorough and competent witness. In contrast, the defense expert, Dr. Davis, was not as thorough

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27. Tr. at 267.

28. Tr. at 267-68.

29. Tr. at 267-69.

in the explanation of his opinion. Moreover, Dr. Ecker's medical opinion makes sense. The court, as a result, adopts as a finding of fact Dr. Ecker's opinion that plaintiff suffers from attacks related to anxiety neurosis and an accompanying hyperventilation syndrome. Furthermore, the court adopts as a finding of fact Dr. Ecker's opinion that plaintiff's injures suffered on May 24, 1981 did not result from such an attack, or from a grand mal epileptic seizure. Ever Dr. Davis, the defense expert, agreed that plaintiff's injuries were consistent with a beating.[30] Additional support for the court's finding lies in the fact that, even though plaintiff has suffered injuries

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30. Tr. 524.

from previous "episodes," the injuries were never as severe as those suffered on May 21, 1981.[31] On one occasion plaintiff had a nervous "episode" and fell off his bed. The bed collapsed on top of him. At that time, plaintiff suffered red spots on both knees, on his right trunk and on his right hand.[32]

While it is possible that plaintiff could have suffered his injuries from neither a beating nor an epileptic seizure or a hyperventilation "episode," defendants do not posit such a theory. The court will not pursue its own theoretical fishing expedition to rule out all other possible causes of

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31. See Plaintiff's Post-Trial Memorandum, pp. 40-41 (containing a summary of the occasions when plaintiff was seen by medical staff following an "episode").

32. Exhibit ("Exh.") (Accident Report filed 12/4/81); see Tr. at 292.

the injuries. Therefore, given the finding that plaintiff's injuries of May 24, 1981 are not consistent with a seizure or "episode" and are consistent with a beating, the court must next address the question of who administered the beating. Two categories of assailants seem possible, plaintiff's fellow inmates or corrections officers.

Defendants did not present to the court the theory that plaintiff received his injuries from fellow inmates. No testimony was elicited to this effect. Furthermore, defendants' version of the events on May 24th fails to demonstrate that plaintiff was not secure in his cell from between 1 p.m. and 5:30 p.m. Neither side contends that plaintiff received his in-

juries prior to the time when he locked into his cell on the afternoon of May 24, 1981. Both sides agree that plaintiff, acting on defendant Maldonado's instructions, locked into his cell at around 1 p.m.[33] Defendants presented no evidence to show that plaintiff was subsequently "cracked out" of his cell until approximately 5:30 that afternoon. Officer Tourangeau testified that he inspected plaintiff at approximately 1:15 p.m. and again at 2:20 p.m.[34] He conducted his inspection of plaintiff through the plaintiffs' cell bars.[35] In his report on the injuries, Sergeant, now Deputy Superintendent, Colon stated

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33. Tr. at 10 and 436.

34. Tr. at 485-86.

35. Tr. at 485-86.

that Officer Rodriguez went to check on inmate Hayden and saw a bruise on his face.[36] Sergeant Colon's report does not specify whether Officer Rodriguez conducted his inspection of plaintiff inside the cell or outside the cell. Plaintiff was released from his cell at approximately 5:30 p.m. when Sergeant Colon instructed Officer Rodriguez to escort plaintiff to the prison hospital.[37] In sum, it is highly unlikely that plaintiff received [sic] was assaulted by non-prison personnel while he was locked in his cell.

Defendants are corrections officers and plaintiff's complaint revolves around the allegation that he

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36. Exh. B.

37. See Exh. B.

was beaten by defendants. In determining whether defendants assaulted plaintiff, the court in part, as noted above, relies on the medical testimony; in part the court also relies on its evaluation of the credibility of individual witnesses. To that end, the court credits plaintiff's testimony that he was assaulted by Officers Brooks and Maldonado and a third unknown officer.[38] With respect to the events leading up to the time of the assault, there is little dispute. Plaintiff badgered defendant Maldonado to allow a fellow inmate attend that afternoon's movie.[39] Defendant Maldonado rejected these requests. He told plaintiff to lock-in, which he

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38. Tr. at 14.

39. Tr. at 9-10 and 427-29.

did.[40] Then defendant Maldonado wrote up a Notice of Report on plaintiff.[41]

At this point the two stories diverge. Plaintiff testified that he was "cracked out" of his cell and told that the sergeant wanted to see him.[42] Then it is plaintiff's testimony that Maldonado, Brooks and a third unknown officer assaulted him; they kicked, hit and punched him.[43] Plaintiff contends that he was hit between the eyes by a heavy object and fell unconscious.[44] However, this contention does not ring true. If plaintiff had received such a blow then Nurse Dupra

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40. Tr. at 10-11 and 428-29.

41. Exh. C-1.

42. Tr. at 12.

43. Tr. at 12-18.

44. Tr. at 16.

likely would have recorded in the medical record an injury to plaintiff's forehead. She did not.[45] Contrary to plaintiff's version, the court finds it much more likely that plaintiff suffered a hyperventilation "episode" during the attack and, as a result, fell unconscious.

The court credits plaintiff's testimony as to what occurred immediately after the assault. He testified that after becoming unconscious he awoke in his cell.[46] Upon waking, plaintiff testified, he got nervous for fear that his assailants would return and beat him some more.[47] He started to hyperventilate and fell

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45. Exh. 1-1.

46. Tr. at 16.

47. Tr. at 19.

unconscious.[48]

Defendants Maldonado and Brooks testified that they did not assault plaintiff.[49] The court does not credit that testimony. The court, as noted above, rejects the defense theory that plaintiff's injuries resulted from a seizure or "episode" in his cell. The court instead finds that on the afternoon of May 24, 1981 both defendants and a third unknown officer assaulted plaintiff and caused the injuries listed in the May 24, 1981 and May 26, 1981 entries on Exhibit 1-1.

While on the whole the court finds credible plaintiff's narration of both the events leading up to

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48. Tr. at 19.

49. Tr. at 426 and 432-33.

the assault and the details of the assault itself, the court does not find that the beating lasted 15 to 20 minutes as plaintiff testified.[50] The injuries are not consistent with a beating of that duration.[51] The court's finding that defendants assaulted plaintiff remains, nonetheless, unchanged. Even if plaintiff exaggerated the length of time of the assault, that does not mean he was not assaulted.

Circumstantial evidence supports the court's finding that the defendants did assault plaintiff on May 21, 1981. Defendant Maldonado conceded that he was a little upset with plain-

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50. Tr. at 18.

51. Tr. at 524 and 534 (Dr. Davis); Tr. at 305 (Dr. Ecker).

tiff.[52] Additionally, after the inmates on the movie list in Block H -- the block in which plaintiff was housed -- left for the movies, and as the inmates who were to go to the yard were leaving for the yard, defendants Maldonado and Brooks were to report to duty in the yard. Even though he testified that he went out into the yard that afternoon,[53] defendant Maldonado apparently did not show up for yard duty. His name does not appear on the yard station list kept by Sergeant LaVarnway on the afternoon of May 24, 1981.[54] In any event, if Maldonado did show up, he was most likely late. One explanation for defendant's absence or tardiness is that

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52. Tr. at 433 and 441.

53. See Tr. at 430.

54. Exh. F; see Tr. at 477.

he was kept late writing up a misbehavior report on plaintiff.[55] Another explanation, which the court finds plausible, is that defendant Maldonado did not show up or was delayed because he both wrote up the misbehavior report and assaulted plaintiff. Officer Brooks' name appears on the yard station list for that afternoon. He was posted as "extra."[56] Officer Brooks was "extra" because, as the yard sergeant testified, "[h]e must have been one of the last ones there."[57] Officer Brooks' late arrival for yard duty confirms that he had an opportunity to assault plaintiff.

The court's finding that

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55. Exh. C-3.

56. Exh. F; see Tr. at 476.

57. Tr. at 477.

defendants assaulted plaintiff is not undermined by the fact that the court does not credit the testimony of Max Vidal, an inmate who attempted to corroborate plaintiff's version of the facts. Vidal was not a credible witness. He proved evasive.[58] Furthermore, as defendants point out, Vidal's story rests on his having free reign of H Block. For instance, he testified that on May 24th at around the time plaintiff was assaulted, he traveled between several galleries on H Block.[59] While this is not impossible, it does not seem plausible because the general practice at Clinton was to keep the doors between the galleries locked

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58. See, e.g., Tr. at 176-77.

59. See, e.g., Tr. at 132-33, 150 and 157.

unless there was movement by the inmates on a large scale.[60]

Finally, the court adheres to its finding that defendants assaulted plaintiff despite conflicting testimony as to whether plaintiff told various prison personnel that he had been assaulted. Plaintiff testified that on May 24th he told two officers that he was assaulted. These were Sergeant Colon,[61] and Officer Rodriguez.[62] Plaintiff also testified that he told Nurse Dupra,[63] Dr. Sheridan, who was the prison doctor,[64] and Dr. Davis[65] that he was assaulted.

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60. Tr. at 410.
61. Tr. at 30.
62. Tr. at 27.
63. Tr. at 32.
64. Tr. at 41.
65. Tr. at 42.

Neither Officer Rodriguez nor Dr. Sheridan testified at trial. However, Sergeant Colon,[66] Nurse Dupra[67] and Dr. Davis[68] all took the stand and denied that plaintiff told them of the assault. In all probability, plaintiff did not tell these individuals that he had been assaulted. The motive for not telling these individuals is that he feared further retribution. Plaintiff testified that after the assault he was scared of the officers.[69] Consequently, he would be reticent to tell any prison personnel that he was attacked, because word might get back to the original assailants.

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66. Tr. at 383.
67. Tr. at 356.
68. Tr. at 518.
69. Tr. at 46; see Tr. at 19.

III. Liability.

The defendants concede in their pre-trial memorandum that "if plaintiff proves that either defendant hit, beat, kicked or punched plaintiff . . . it would constitute . . . 'unnecessary and wanton inflection [sic] of pain' and violate the Eighth Amendment." They cite for this proposition Whitley v. Albers, 475 U.S. 312, 320 (1986). See Unwin v. Campbell, 863 F.2d 124, 129 (1st Cir. 1989) ("the unjustified striking, beating, or infliction of bodily harm upon a prisoner gives rise to liability under 42 U.S.C. § 1983 on the part of one who, acting under color of state law, engages in such conduct without just cause") (quoting King v. Blankenship, 636 F.2d 70, 72 (4th Cir.

1980)); see also Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied sub nom., John v. Johnson, 414 U.S. 1933 (1973). Given the findings of fact in this case, the court concludes that defendants did violate plaintiff's eighth amendment rights and are liable for damages under 42 U.S.C. § 1983.

As noted much earlier, plaintiff, in addition to his claim under § 1983, also makes a claim under 42 U.S.C. § 1985. Section 1985 is captioned "Conspiracy to interfere with civil rights." In the case at bar, plaintiff cannot prevail under § 1985 because he presented the court with no evidence of a conspiracy. See Traggis v. St. Barbara's Greek Orthodox Church, 851 F.2d 584, 586-87 (2d Cir. 1988).

IV. Damages.

Plaintiff suffered the eight injuries previously listed in this opinion. He stayed in the prison hospital for two weeks after the assault. He complained of headaches and was treated with Tylenol and Vizine.[70] Despite the short duration of plaintiff's hospitalization and despite the unextraordinary nature of the care he received, plaintiff still complains of a lasting effect from the assault; namely he claims his vision is affected and he must wear glasses to correct it.[71] The court cannot accept plaintiff's contention of a lasting injury. By his own admission,

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70. Tr. at 43.

71. Tr. at 48.

plaintiff has worn glasses since 1969.[72] Furthermore, as defendants argue, there was no medical testimony establishing a causal connection between plaintiff wearing glasses and being beaten. Moreover, plaintiff's medical witness, Dr. Ecker, testified that the retinal hemorrhage had healed by the time he examined plaintiff on the first day of trial.[73] For the purpose of assessing damages, the court concludes that plaintiff suffered no permanent injuries.

"Physical injury as well as intangible injuries, such as pain and suffering, personal humiliation, mental distress, and embarrassment are compensable injuries under Section 1983."

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72. Tr. at 87.

73. Tr. at 314.

Freeman v. Franzen, 695 F.2d 485, 493 (7th Cir. 1982) (citations omitted), cert. denied, 463 U.S. 1214 (1982). In his complaint plaintiff seeks $100,000 in compensatory damages. The court awards plaintiff $12,300 dollars in compensation for his physical injuries and mental distress.

The issue of punitive damages is presently not before the court. During trial, the court bifurcated the consideration of punitive damages from the consideration of liability and compensatory damages.[74] At 10:30 a.m. on July 5, 1989 in the United States Courthouse in Auburn, New York this court will continue the trial as to the issue of punitive damages. The

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74. Tr. at 322.

parties are directed to file pre-trial submissions on this issue on or before June 14, 1989.

It is So Ordered.

Syracuse, New York.

Howard G. Munson
United States
District Judge

March 24, 1989

APPENDIX B

"Eng videotape" - lodged with Clerk

APPENDIX C

DEPOSITION EXHIBITS FROM
YOUNG V. NAPPER
No. 86-CV-453
(N.D.N.Y.)

In written material, words in **bold face** were printed on a form, words in ordinary type were typed onto a form, and words in *italics* were hand written. All relevant portions reproduced.

DEPOSITION EXHIBIT 3

Unusual Incident 2232, Use of Force 1271 - July 8, 1985 - Assault on Staff, Disruptive Behavior, Refusal to Follow Instructions - Inmate Cedric Young 79 A 836

CLINTON CORRECTIONAL FACILITY

USE OF FORCE-PHYSICAL EXAMINATION

INMATE'S NAME: *Young, Cedric*

DEPT. ID. NO.: *79 A 836*

EXAMINER'S NAME AND TITLE: *Philip T. Erickson, RN II*

TIME OF EXAMINATION: *9:00 AM*

DATE OF EXAMINATION: *7/8/85*

MEDICAL REPORT, DESCRIBE EXTENT OF INJURY AND TREATMEMT PROVIDED:

EXAMINED NUDE - ABRASION with CONTUSION ANTERIOR PORTION LT SHOULDER - Addendum 9:30 am Pt reexamined - superficial scratch + discolor on (R) upper arm (R) thigh (R) rib area and (R) chest.

RX: WOUND CLEANSED with H_2O
Addendum 9:30 Same Rx

Philip T. Erickson

DEPOSITION EXHIBIT 4

ACCIDENT REPORT

DATE OF ACCIDENT: *7/8/85*

PLACE: *YARD DOOR*

TIME: *approx. 8:45* **AM.**

INMATE'S FULL NAME: *YOUNG, CEDRIC*
NUMBER: *79 A 836*

EXTENT OF INJURY. DESCRIBE FULLY:

EXAMINED NUDE - ABRASION with CONTUSION ANTERIOR PORTION LT SHOULDER

Addendum 9:30 AM. Pt. reexamined - superficial scratch and discoloration on (R) upper arm, (R) thigh (R) rib area and (R) chest.

TREATMEMT EXTENDED. DESCRIBE FULLY:

WOUND CLEANSED with H_2O_2
Addendum 9:30 am, same Rx.

INMATE'S STATEMENT: *NO STATEMENT*

TIME INMATE ARRIVED AT HOSPITAL:
9:00 **AM.**

NAME OF PERSON FURNISHING TREATMENT:
Philip T. Erickson, RN

DEPOSITION EXHIBIT 31

STATE OF NEW YORK-DEPARTMENT OF CORRECTIONAL SERVICES

AMBULATORY HEALTH RECORD

INMATE NUMBER: *79 A 836*

INMATE NAME: *YOUNG, C.*

DATE: *07/08/85*

SUBJECTIVE: *USE OF FORCE*

OBJECTIVE: *ABRASION with CONTUSION ANTERIOR PORTION LT SHOULDER*

PLAN OR RX: *(1) ARMO (2) USE OF FORCE (3) WOUND CLEANSED with* H_2O_2

DATE: *07/08/85*

SUBJECTIVE: *Admission to Unit 14*

OBJECTIVE: *11:30 AM. Seen on admission to U.14. No new injuries noted from ARMO @8:45 AM.*

SIGNATURE: *C. Rock N*

DATE: 07/08/85

SUBJECTIVE: *Seen by C. Cobus RN MHSU while making PM rounds*

OBJECTIVE: *c/o multiple aches pains some trouble deep breathing sl dizzy*

PLAN OR RX: *TO SEE PA IN AM*

SIGNATURE: *R. Provence RN*

DATE: *07/09/85*

SUBJECTIVE: *c/o of mild Headaches, denies blurriness of vision or dizziness; denies breathing problems*

PLAN OR RX: *(1) will follow-up daily; (2) Sip & rinse mouthwash; (3) ASA 2 q 6 hrs prn*

DATE: *7/9/85*

SUBJECTIVE: *brought to IPC per ambulatory by order of watch commander*

OBJECTIVE: *c/o generalized aches & pains*

PLAN OR RX: *wants sleeping med. - told to see MHSU*

SIGNATURE: *R. Provence, RN*

DATE: *07/11/85*

SUBJECTIVE: *"involved in altercation"*

OBJECTIVE: *Generalized aches & pains.*

PLAN OR RX: *(1) Sip & Rinse mouthwash; (2) MLT 2 q 6 hrs prn*

DATE: *07/17/85*

SUBJECTIVE: *dry skin.*

PLAN OR RX: *(1) A & D ointment; (2) cepacol lozenges*

DATE: *07/18/85*

SUBJECTIVE: *Dry Skin; wants mouthwash*

PLAN OR RX: *(1) sip & rinse; (2) A & D ointment*

DEPOSITION EXHIBIT *70*

7/8/85, 3:20-11:20 cont.

3:50: Young, 79A 836 returned to cell. No incident.

3:55: Inmate Young, 79 A 836, examined by this writer - pt had numerous c/o - all reported to Med Staff Nurse, R. Provence

Pt. condition seems stable @ present - to be seen by P.A. in Morning

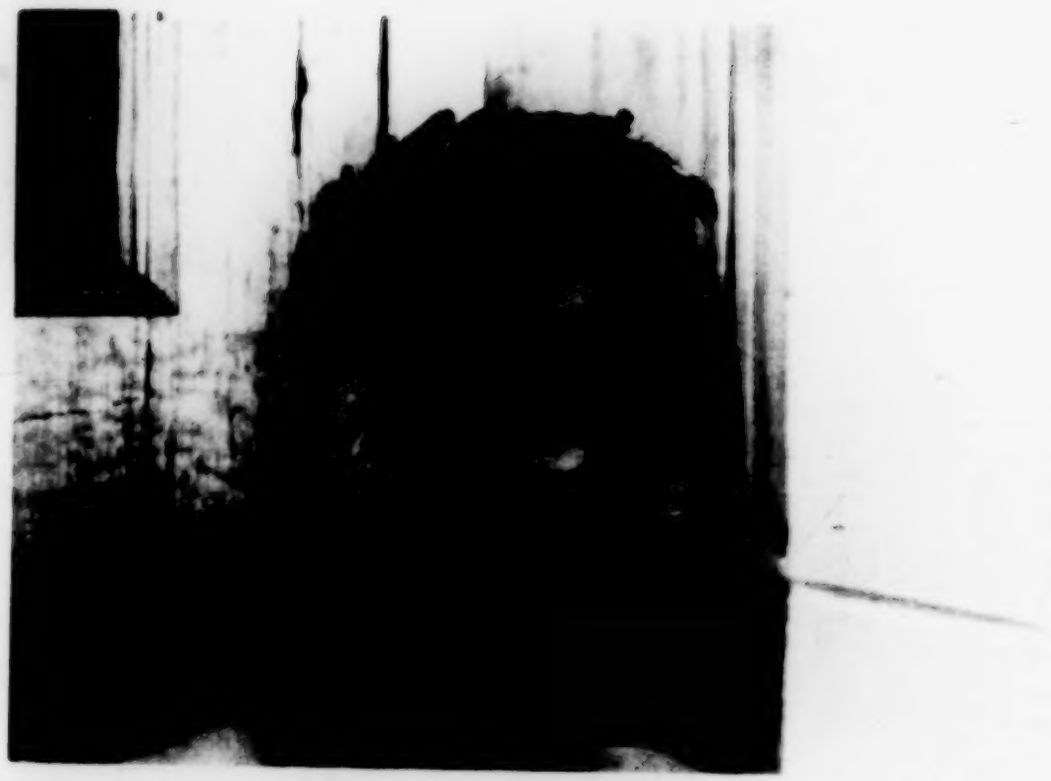
C. Cobus, RN

DEPOSITION EXHIBIT 87

Medical Log

3-11: 7-9-85

s/c 4:20 Young 79 A 836 U-14, Brought to IPC seen per request watch commander - "aching all over" Tylenol given



DEPOSITION EXHIBIT 85

DEPOSITION EXHIBIT 86

APPENDIX D

Correction Law, §137(5)

No inmate in the care or custody of the department shall be subjected to degrading treatment, and no officer or other employee of the department shall inflict any blows whatever upon any inmate, unless in self defense, or to suppress a revolt or insurrection. When any inmate, or group of inmates, shall offer violence to any person, or do or attempt to do any injury to property, or attempt to escape, or resist or disobey any lawful direction, the offi-

cers and employees shall use all suitable means to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders and to prevent any such attempt or escape.

The administrative policy is:

New York State Department of Correctional Services, Directive 4004, p. 1 (February 21, 1979).

The following rules will govern the use of physical force:

a. The greatest caution and conservative judgment shall be applied in determining whether physical force is necessary and the degree of such force.

b. When it is necessary to use

physical force, only such degree of force as is reasonably required shall be used.

c. Unless there is an immediate danger to safety, security or property, an employee will notify his supervisor who will notify the Superintendent, or person designated to act in the Superintendent's absence, of any situation where the use of physical force may become necessary and will not attempt to use physical force except in accordance with instructions received from the person designated by the Superintendent to take charge of the situation.

d. An employee will not lay hands on or strike an inmate unless the

employee reasonably believes that the physical force to be used is necessary for self-defense, to prevent injury to person or property, to enforce compliance with a lawful direction, to quell a disturbance, or to prevent an escape.

e. Other than a firearm, or chemical agents, an employee must use a weapon, for example a baton, issued by the Department only when and to the extent that the employee reasonably believes such use is necessary for self-defense, to prevent a serious assault, gross destruction of property, to quell a disturbance, or to prevent an escape. When it is necessary to use such a weapon, employee should take due care to

avoid, to the best of his ability the infliction of serious physical injury.

Supreme Court, U.S.
FILED
JUL 10 1991
OFFICE OF THE CLERK

No. 90-6531

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

KEITH J. HUDSON,

Petitioner,

v.

JACK McMILLIAN, MARVIN WOODS,
and ARTHUR MEZO,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit**

BRIEF FOR HUMAN RIGHTS WATCH, *AMICUS CURIAE*, SUGGESTING REVERSAL

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BRIEF FOR HUMAN RIGHTS WATCH, *AMICUS CURIAE*, SUGGESTING REVERSAL

This *amicus* brief is submitted, with the consent of counsel for all parties, on behalf of Human Rights Watch.

THE INTEREST OF HUMAN RIGHTS WATCH AS *AMICUS CURIAE*

The interest of Human Rights Watch in suggesting reversal of the decision below stems from its role as the leading United States-based international human rights monitoring organization. Through its five regional divisions -- Africa Watch, Americas Watch, Asia Watch, Helsinki Watch, and Middle East Watch -- Human Rights Watch seeks to promote internationally recognized human rights by monitoring and reporting on, and thereby seeking to stigmatize, governmental violations in some 60 nations.

A major focus of Human Rights Watch's work is the prevention of torture and mistreatment of persons in official custody. Its researchers have examined prison conditions and the conduct of custodial officials in many countries including the United States. Human Rights Watch's organizational mission, informed by a detailed knowledge of the nature and extent of physically abusive conduct by officials in prisons throughout the world, leads it to be concerned with the outcome of this case -- an outcome that will send a powerful message about this country's position on what constitutes acceptable conduct towards people in custody.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit, in the decision under review, has adopted a constitutional standard that, if affirmed, would bare as hypocritical pieties decades of American proclamations about the right of every person, at home and abroad, to be free from violent, physical abuse by government officials. The court of appeals held that guards in an American prison may, consistent with our Bill of Rights, shackle their charges by the wrists and ankles, hold them from behind, and then hit them repeatedly in the face, loosening teeth, breaking dental plates, and splitting lips, and kick them in the buttocks -- all while supervising officers stand by commenting, "Don't have too much fun." To state the rule is to refute its compatibility with the Eighth Amendment.

The United States consistently has admonished other nations that the conduct found by the court below to be constitutionally

permissible in a Louisiana prison is an intolerable affront to human rights in the international arena. The lower court's application in this case of the superficially unprepossessing "significant injury" prong of a four-part Eighth Amendment test denies a generation of work by international organizations showing that, through the practiced use of rubber hoses and truncheons, electric shock to genitals, near asphyxiation or drowning, cigarette burns -- and, as here, naked fists and booted feet -- terrible suffering can be inflicted in a single instance that leaves no lasting physical injury requiring medical treatment (forgetting altogether, as does the court below, the psyche).

In this brief, Human Rights Watch, *amicus curiae*, suggests reversal of the decision under review. We here recall for the Court's consideration (1) the conventions and international agreements reflecting the United States government's position that the conduct at bar breaches international norms of civilized conduct; and (2) the published authorities recognizing that what was done to the petitioner in this case is unacceptable abuse, not "insignificant injury."

The proposition we assert is straightforward: unless this Court repudiates the "significant injury" standard as applied below, years of struggle in the field of international human rights will be eviscerated. The world will see that what our government preaches abroad is ignored at home; that our Bill of Rights, on its 200th birthday, provides less protection against physical cruelty than our own government urges as a minimum standard of conduct in the most oppressive dictatorships operating in the world today.

ARGUMENT

I. THE "SIGNIFICANT INJURY" STANDARD CONFLICTS WITH OUR INTERNATIONAL OBLIGATIONS AND WITH OUR GOVERNMENT'S EXPLICIT CONDEMNATION OF PHYSICAL ABUSE BY CUSTODIAL OFFICIALS

The United States has long exercised moral leadership in the international community aimed at eradicating both torture and less egregious forms of abuse by custodial officials. Through its membership in the United Nations, its adherence to treaties, and the work of its State Department, the United States has vigorously denounced inhuman treatment of prisoners wherever and whenever it occurs. In so doing, our government has recognized repeatedly that cruel and inhuman treatment is defined in terms of the wantonness of the abuse and not the significance of the resulting injury.

A. "Significant Injury" Forms No Part of Any Internationally Recognized Test for Defining Cruel and Inhuman Punishment

The unnecessary and violent assault of prisoners -- what happened to the petitioner in this case -- is the sort of punishment that the United States (and many other nations) has condemned in the international arena for decades. A network of treaties and conventions, as well as United Nations declarations, resolutions and rules, uniformly affirm that cruel and inhuman treatment of prisoners is unacceptable. Not one of these authorities contains, or has been construed to contain, a "significant injury" exception of the sort fashioned by the Fifth Circuit in this case. Although the citations can be multiplied, it perhaps suffices to recall the relevant United Nations documents and our government's recent adherence to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

Starting in 1948, in Article 5 of the *Universal Declaration of Human Rights*, and again in 1966, in Article 7 of the *International Covenant on Civil and Political Rights*, the United Nations unequivocally proclaimed the right of every individual to be free

from excessive punishment: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *See Universal Declaration of Human Rights*, art. 5, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948); *International Covenant on Civil and Political Rights*, art. 7, G.A. Res. 2200 A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (effective May 23, 1976). In 1975, through the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the United Nation's General Assembly once again condemned torture and cruel and inhuman punishment. *See* art. 2, G.A. Res. 3452 (XXX), 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975). In addition, the United Nations has declared specifically that the beating of prisoners breaches minimum acceptable standards of conduct. *See Standard Minimum Rules for the Treatment of Prisoners*, art. 31, U.N. Doc. A/Conf.6/1 Annex I (1957), *reprinted in* United Nations, *Human Rights: A Compilation of International Instruments* 190, 196 (1988) ("Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishment for disciplinary offenses").[1/]

Most recently, in 1984, the United Nations unanimously adopted the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereafter "the *Convention*"). G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 16) at 197 (1984) (entered into force June 26, 1987). By signing the *Convention* in 1988, the United States affirmed its role as a leader

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[1/] The European Community as well as North and South American and African nations, independent of the United Nations, also have condemned the wanton abuse of people in official custody. *See Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (effective Sept. 3, 1952); *American Convention on Human Rights*, art. 5, Nov. 22, 1969, 36 O.A.S.T.S. 1 (effective July 18, 1978); *African Charter on Human and Peoples' Rights*, art. 5, June 1981, OAU Doc. CAB/LEG/67/3/Rev. 5 (effective Oct. 21, 1986).

in the fight for basic human rights.[2] The *Convention*, in addition to establishing a regime for international cooperation in the criminal prosecution of torturers,[3] requires its signatories, pursuant to Article 16, to prevent within their own boundaries other acts "[o]f cruel, inhuman or degrading treatment or punishment which do not amount to torture".[4]

In ratifying the *Convention*, the Senate specified in a reservation that Article 16 would be interpreted as being co-extensive with the Eighth Amendment's ban on cruel and unusual punishment. At the hearings on ratification, the State Department's Legal Adviser, Abraham Sofaer, noted this reservation and testified, "Our courts have interpreted this [Eighth Amendment] prohibition to protect against a broad range of practices that involve the *unnecessary and wanton infliction of pain*." *See Convention Against Torture: Hearings Before the Senate Committee on Foreign Relations*, 101st Cong., 2d Sess. 11 (1990) (statement of Abraham Sofaer, Legal Adviser, Dep't of State) (emphasis added). At no point in the course of the hearings did any State Department representative (or anyone else) suggest that, absent "significant injury," there could be no violation of Article 16. On the contrary,

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[2] The United States signed the Convention in 1988 and it was ratified by the Senate in October 1990. *See* Leich, *Contemporary Practice of the United States Relating to International Law*, 85 Am. J. Int'l L. 334, 335 (1991). At this writing, the ratification papers have not yet been deposited with the United Nations – a formality of no substantive importance.

[3] Article 1 defines torture as follows:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Convention, *supra*, art. 1.

[4] Under the *Convention*, the United States must ensure that law enforcement personnel are instructed that such cruel and inhuman punishment is prohibited, *id.*, art. 3, and that competent authorities conduct a prompt and impartial investigation if there are reasonable grounds to believe that a violation has been committed, *id.*, arts. 12 and 13.

as noted, the stress was put on the "unnecessary and wanton" nature of the act -- elements that indisputably are present on the record at bar.

In summary, "significant injury," as that term was applied by the Fifth Circuit in this case, forms no part of the definition of unacceptable punishment under the international conventions, resolutions, and rules discussed above. Likewise, it should form no part of Eighth Amendment jurisprudence in this country.

B. The State Department Regularly Condemns Conduct by Custodial Officials Abroad That Causes No "Significant Injury"

In addition to the United States's international commitments, Congress has enlisted the State Department to monitor incidents of torture and other cruel, inhuman, or degrading treatment or punishment that take place abroad. The State Department publishes the results of its efforts annually in *Country Reports on Human Rights Practices* (hereafter the "*Country Reports*") that are submitted to Congress in compliance with sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961, as amended, *see* 22 U.S.C. §§ 2151n(d), 2304(b) (1988).

These reports, which "unashamedly reflect[] the U.S. view," *Country Reports* x (1990), demonstrate the leadership role that the United States seeks to play in the battle against intentional acts of physical abuse by custodial officials. *See id.* at xi (the *Country Reports*, by giving "continuous and well-publicized attention to human rights, ha[ve] contributed to the strengthening of an international human rights agenda"). The incidents described in the *Country Reports* are included for the specific purpose of serving as examples of "Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment." *See, e.g., id. passim*. Accordingly, the nature of the incidents provides reliable guidance as to the standards used by our government in assessing what is and what is not acceptable conduct by custodial officials.

In Point II of this brief, we set forth a number of examples drawn from the *Country Reports*. They make it clear that, in contrast to the Fifth Circuit's standard, the State Department's definition of cruel and inhuman treatment does not require a "significant injury." This conclusion is confirmed by written

instructions that the State Department has furnished to our embassies in connection with the compilation of the 1990 *Country Reports*:

> The abuse of psychiatry . . . is a form of cruel, inhuman or degrading treatment or punishment and may constitute torture depending on its severity. . . . Police beatings of criminals, inhumane prison conditions, or violence by police or military personnel which is permitted because of poor supervision, improper training, or indifference to individual behavior, fit clearly into the 'cruel' category.

Copy of instructions provided by Thomas E. Williams, Director of Country Reports Team of United States Dep't of State to Kenneth Roth, Deputy Director of Human Rights Watch (July 8, 1991) (available in Human Rights Watch files).

These instructions, together with the examples set forth below, make explicit what in any civilized nation should go without saying: it is a breach of the ban against cruel and unusual punishment to inflict pain unnecessarily and wantonly on a helpless prisoner. The coincidence that such pain was inflicted by means of a technique that, whether by design or by chance, produced no injury requiring medical treatment does not change the result. Such a coincidence must surely be irrelevant to any modern Eighth Amendment analysis.

Unless the decision below is reversed, a standard will have been set in this country that provides less protection against wanton brutality than that which our government has long urged upon the rest of the world as a minimum standard of decency and civilized conduct. Such an anomaly would constitute a severe setback in the fight for human rights.

II. THE "SIGNIFICANT INJURY" STANDARD AS APPLIED BELOW SANCTIONS INTOLERABLE PHYSICAL AND PSYCHOLOGICAL ABUSE

The Fifth Circuit's "significant injury" requirement, read against the factual backdrop of this case, opens too wide a door. It fails to recognize that terrible pain can be caused by techniques that leave no physical mark, that produce no medically treatable condition, and that can be administered in a single incident. It fails to recognize also that conduct giving rise to severe psychological damage can be inflicted in a single incident that produces no injury requiring medical treatment. The documented examples of such incidents are legion. They include the following:

— In Northern Ireland, British security forces subjected IRA members to "interrogation in depth" with techniques that included forcing detainees to remain spreadeagled against the wall, with the fingers bearing the weight of the body; hooding of the detainees; subjection to noise; and deprivation of food and drink. The European Court of Human Rights held that these practices constituted inhuman treatment. *See Ireland* v. *United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

— In Mexico, "[m]ethods range from beatings to death threats and other forms of psychological intimidation to sophisticated torture techniques designed to leave no lasting physical marks." Americas Watch, *Human Rights in Mexico: A Policy of Impunity* 9 (1990).

— In Nicaragua, beatings were administered with rubber instruments, or boxing gloves, or sticks wrapped in towels -- "to avoid marks." *Country Reports* 620 (1985). There was also the case of Sofonias Cisneros who was stripped naked, handcuffed, kicked and beaten against a wall, and had a pistol placed against his temple -- none of which resulted in "significant injury" as applied by the Fifth Circuit. The State Department characterized this conduct as "torture," and not merely as "cruel, inhuman and degrading" treatment. *See* U.S. Dep't of State, *Human Rights in Nicaragua under the Sandinistas: From Revolution to Repression* 25-26 (1986).

— In Brazil, interrogations were accompanied by physical abuse designed to leave no physical trace; one army instruction document states: "press hard *without* leaving marks." *Torture*

in Brazil: A Report by the Archdiocese of Sao Paulo 180 (J. Dassin ed. 1986).

— From Czechoslovakia, there was this report: "One inmate saw some very severe beatings, which were done in a way to leave no marks: the prisoner was wrapped in a wet sheet and then beaten with clubs and fists." Helsinki Watch, *Prison Conditions in Czechoslovakia* 11 (1989), *cited in Country Reports* 1124 (1990).

These examples are drawn from an extensive literature aimed at publicizing, and thereby stigmatizing, clear examples of human rights abuses.[2/] The conduct they depict is condemned as

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[2/] *See, e.g.*, Amnesty Int'l, *Torture in the Eighties* 144 (1984) (in Argentina, "[t]he most common methods of torture . . . were the following: electric shocks applied to all parts of the body with the *picana electrica* (electric cattle prod); '*submarino*': immersion in water with the head covered by a cloth hood--when this becomes wet, it sticks to the nose and mouth and when the victim is taken out of the water breathing is practically impossible; beatings with fists, truncheons, rifle butts and sticks; kicks; cigarette burns; plunging victims into ice cold baths; keeping victims hooded; forcing prisoners to stand in awkward positions for hours; depriving prisoners of food, drink and sleep"); *id.* at 151 (in Chile, most common physical torture included beatings and administration of electric shocks); *id.* at 153 (in Colombia, "[t]he range of techniques of torture included: systematic beatings; near drowning; near asphyxiation; electric shocks; sexual abuse; the use of drugs to induce pain or disorientation; enforced standing; deprivation of sleep, food and sometimes water; exposure to sun or rain or cold; and suspension by the arms while bound or handcuffed behind the back"); *id.* at 171 (in Peru, "[p]risoners were stripped naked during interrogation, regularly drenched with cold water, and systematically beaten with leather or fabric implements filled with sand"); *Implementation of the Helsinki Accords: Hearings Before the Commission on Security and Cooperation in Europe*, 101st Cong., 1st Sess. 12 (1989) (testimony of Darrel Regier, M.D., Director of Division of Clinical Research, National Institute of Mental Health) (detailing abuses of psychiatry in Soviet Union, including high levels of medicine used to treat "delusions of reformism" and sulfazine treatment for punitive purposes); *Country Reports* 519 (1988) (in Cuba, beatings with rubber hoses and fists); *Country Reports* 443 (1987) (in Cuba, prisoners placed in refrigerated cold-storage rooms; stuck with needles); U.S. Dep't of State, *Human Rights in Nicaragua under the Sandinistas: From Revolution to Repression* 26-27 (1986) (political leader's glasses were taken away and he was given newspaper that purportedly had front-page account of his parents' deaths); *Country Reports* 621 (1985) (in Nicaragua, prisoners placed in sealed cars in direct sunlight until they dehydrate); *Country Reports* 667 (1990) (in Honduras, suffocation through use of hood placed over head); *Country Reports*

(continued...)

unacceptable by, among others, our own Department of State. Yet the beating administered to the petitioner at bar — a beating that is indistinguishable from many of the incidents described in the sources cited above — has been dismissed as insufficiently severe to warrant redress under the Eighth Amendment. Such a result cannot stand.

[2/](...continued)
1357 (1988) (in Iraq, "[t]he security forces' methods of torture . . . reportedly include beatings with fists and rubber truncheons, electrical shocks to the genitals and other parts of the body, and the extraction of fingernails and toenails, as well as psychological torture"); *Country Reports* 717 (1990) (in Panama, "police on occasion gratuitously punched and hit detainees in the course of arrest"); *Country Reports* 989 (1987) (in Poland, "detainees have lodged complaints that policeman repeatedly banged their heads against concrete floors or metal arm rails or kicked them in the face and genitals"); Neier, *Watching Rights*, 251 The Nation 723 (1990) (reporting that deputy police chief applies electric cattle prod to genitals); *see also Country Reports* 359 (South Africa), 611 (El Salvador), 930 (Korea), 953 (Malaysia), 1429 (India), 1445 (Iran), 1479 (Israel), 1587 (Pakistan) (1990).

CONCLUSION

For the reasons set forth above, Human Rights Watch suggests that the decision below should be reversed.

Dated: New York, New York
July 10, 1991

Respectfully submitted,

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[g] This brief was prepared with the assistance of Jonathan Galst and Lynn Oberlander who are not yet members of the bar.

(12)

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No. 90-6531

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

KEITH J. HUDSON,

Petitioner,

v.

JACK McMILLIAN, MARVIN WOODS AND ARTHUR MEZO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE THE D.C. PRISONERS' LEGAL SERVICES PROJECT, INC., IN SUPPORT OF PETITIONER

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STATEMENT OF CONSENT AND INTEREST OF THE AMICUS CURIAE

The parties to this proceeding, by their respective counsel of record, have consented to the filing of this Brief.

The D.C. Prisoners' Legal Services Project, Inc. ("the Project"), a non-profit organization established in 1986, provides legal representation to indigent prisoners in the District of Columbia Correctional System with respect to confinement and non-confinement related civil matters. It gives priority to cases that raise substantial health and safety concerns, as well as cases that raise issues relating to prisoners' access to the courts.

The Project's participation as an amicus curiae in this case is based upon its substantial and concrete interest in the rejection of the standard adopted by the court below. Many prominent legal

advocacy organizations concerned with prisoners' issues are, in most instances, involved in seeking broad declaratory or injunctive relief on behalf of classes of prisoners on institution-wide or systemwide bases. Although such litigation constitutes a portion of the Project's caseload, the Project, as distinguished from other organizations, also represents individual prisoners in their prosecution of claims for damages premised upon violations of their constitutional rights under the First, Fifth and Eighth Amendments to the United States Constitution, pursuant to 42 U.S.C. § 1983.

One such case, currently pending, is Edward L. Bellamy, et al. v. District of Columbia, et al., C.A. No. 90-2283 (D.D.C.) (Bryant, Sr. J.) ("the Bellamy case"), wherein several current and former inmates of the District of

Columbia Detention Facility ("D.C. Jail"), seek declaratory relief and damages under Section 1983, alleging that they were the victims of a series of unprovoked and unjustified beatings and macings by correctional officers acting under color of District of Columbia law. Two of the plaintiffs in the Bellamy case allege permanent disabilities as a result of the physical abuses inflicted upon them, while the remaining plaintiffs allege no permanent injury. The alleged wanton and malicious conduct of the correctional officers is essentially identical in each instance.

Applying the Fifth Circuit's "significant injury" standard, the district court in the Bellamy case might well be required to hold that the plaintiffs alleging permanent disability as a result of defendants' excessive force have stated Eighth Amendment claims

for which relief can be granted under Section 1983, while the other plaintiffs' claims must be dismissed, notwithstanding the allegations of all plaintiffs that they were subjected to the same course of brutal treatment. The patent anomaly of such a result demonstrates the illogical and unworkable nature of an Eighth Amendment standard which assesses the "cruel and unusual" character of punishment by focusing on the effect of that punishment, rather than on the intent of the unlawful actor(s).

The Project's amicus participation herein is motivated by its clear interest -- as a legal advocate for the Bellamy plaintiffs and for District of Columbia prisoners generally -- in seeing this Court act, in accordance with its own overwhelming past precedent, to reject the Fifth Circuit's ill-founded "significant injury" threshold standard

for Eighth Amendment claims, thus confirming prisoners' access to a federal forum within which to vindicate their federal constitutional rights when they have been subjected to willful, wanton excessive force during incarceration.

SUMMARY OF ARGUMENT

The placement of a "significant injury" barrier at the front door of each federal district court, impeding the access of prisoners subjected to unjustified physical abuses who would seek vindication of their Eighth Amendment rights pursuant to actions brought under 42 U.S.C. § 1983, constitutes an act of judicial fiat which cannot withstand reasoned analysis. The requirement is without foundation in controlling law or logic, and must be overturned.

First, the methodology employed by the Fifth Circuit in fashioning its four-part mandatory standard (including "significant injury") for assessing the viability of an Eighth Amendment claim was hopelessly flawed from the outset. This Court's precedents -- including cases the Fifth Circuit purports to have followed -- demonstrate the clear error in that court's attempt to engraft distinct modes of Fourth and Eighth Amendment analysis into a single device obviously intended to promote the summary rejection of most prisoners' claims.

Second, the substantive standard yielded by the Fifth Circuit's flawed methodology is itself irreconciliable with this Court's various articulations concerning the character or quality of state conduct directed toward incarcerated individuals that will be found violative of the Eighth Amendment

prohibition against "cruel and unusual" punishment.

Finally, even if these legal defects were not alone sufficient to require reversal of the decision below, it is apparent that from a purely practical perspective, the Fifth Circuit's "significant injury" threshold standard is devoid of merit. Although purportedly susceptible of application on an "objective" basis, the standard's inherently subjective character renders it unsuitable for the purpose it is apparently intended to serve.

ARGUMENT

In Whitley v. Albers, 475 U.S. 312 (1986), this Court addressed the analytical factors governing the adjudication of "cruel and unusual" punishment claims for "excessive force" under the Eighth Amendment brought pursuant to 42 U.S.C. § 1983. This Court

expressly stated in Whitley that the "extent of injury inflicted" was but one of several relevant factors to be considered in this context. Id. at 321. The current rule in the Fifth Circuit that prisoners asserting Eighth Amendment excessive force claims under Section 1983 must allege and demonstrate the capability of proving that they suffered a "significant injury" as an isolated threshold requirement, cannot withstand scrutiny under Whitley or this Court's other relevant precedents.

I. PROOF OF A "SIGNIFICANT INJURY" IS NOT A PREREQUISITE TO AN EIGHTH AMENDMENT CLAIM

In the proceedings below, the Fifth Circuit accepted the findings of fact reached by a federal magistrate, after a full trial on the merits, regarding the "clearly excessive and . . . unnecessary and wanton infliction of pain," by respondents against petitioner. Joint

Appendix ("J.A.") 32. However, the court below reversed the decision in favor of petitioner on the ground that his resulting injuries were not "significant". J.A. 33. According to the court, petitioner failed to prove that he had been a victim of cruel and unusual punishment because he was not injured badly enough by the beating. Id.

This decision was grounded in recent Fifth Circuit cases requiring plaintiffs who bring Eighth Amendment "excessive force" claims to prove that they have suffered "significant injury". But the presence of the "significant injury" requirement in the Fifth Circuit's Eighth Amendment jurisprudence can be traced to an unfortunate methodological misstep, whereby the Fifth Circuit swept all of its previously articulated Fourth Amendment standards into an Eighth

Amendment case. This was done despite the teaching of this Court in Graham v. Connor, 490 U.S. 386 (1989), that Fourth and Eighth Amendment standards are distinct in concept and application. Indeed, when this Court's Eighth Amendment decisions are canvassed, the conclusion is inescapable that no "significant" injury need be shown.

A. The Fifth Circuit Improperly Integrated Fourth And Eighth Amendment Standards

In Huquet v. Barnett, 900 F.2d 838 (5th Cir. 1990), the Fifth Circuit adopted the standard it currently applies to Eighth Amendment "excessive force" claims. The Huquet decision, in turn, rested upon Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989) (en banc).

In Johnson v. Morel, the Fifth Circuit developed its current standards for assessing claims of excessive force brought under the Fourth Amendment. A

divided panel of the Fifth Circuit held that "severe injury" is "a necessary element of a § 1983 civil rights action complaining of the use of undue force." 843 F.2d 846, 847 (5th Cir. 1988). On rehearing of the case, en banc, the court held, in a per curiam opinion, that "a significant injury" was one of three required elements to be alleged and proven by a plaintiff in order to "prevail on a Constitutional excess force claim[.]" 876 F.2d at 480 (footnote omitted).

The decision gave no clue as to the source of the "significant injury" requirement. Nor did it illuminate the difference between the "severe injury" standard endorsed by the panel and "significant injury". As to the meaning of the new standard, the court stated only that:

> We think it unlikely that such a significant injury will be caused by unnecessary force without significant physical injury. However, on the facts before us here, we do not decide whether a significant but non-physical injury would be legally significant.

Id. at 480 n.1 (emphasis in original).

Seven of sixteen judges dissented from the holding that a significant injury is a prerequisite to a Fourth Amendment claim. In their view, Fourth Amendment "protection is not limited to physical injuries but extends to all damage inflicted. . . ." Id. at 481. (Rubin, J., concurring in part and concurring in judgment). The dissenters also pointed out that this Court, in Graham v. Connor, had the opportunity to adopt a severe injury requirement, and noted that "[a]lthough the Court did not rule on the question explicitly, its opinion surely contains no quantum-of-injury criterion." Id.

While Johnson v. Morel was a Fourth Amendment case, it has been transposed into the Fifth Circuit's Eighth Amendment jurisprudence. In Huquet, a panel of the Fifth Circuit, relying on Johnson, adopted a mandatory four-part test for determining the sufficiency of a prisoner's Eighth Amendment excess force claim, including the "significant injury" element, and stated that "[i]f any one of these elements fails, so too does the plaintiff's claim." Id. at 841. The panel observed that this Court has described cruel and unusual punishment as conduct which involves the "unnecessary and wanton infliction of pain." See, e.g., Whitley v. Albers, 475 U.S. at 319. Thus, because Huquet involved an Eighth Amendment excessive force claim, the panel took the three required Johnson elements for Fourth Amendment claims and, adding the requirement that the alleged

state action must constitute the unnecessary and wanton infliction of pain, applied them to Eighth Amendment claims.

Viewed from the perspective of this Court's constitutional jurisprudence, the Huquet requirements are a patchwork of three disparate components which, combined, reflect a radically restrictive standard. In effect, Huquet holds that any claim of an Eighth Amendment violation must (1) meet the requirements imposed by Graham v. Connor for a violation of the Fourth Amendment (as construed in Johnson v. Morel), (2) meet the requirements imposed by Whitley v. Albers for an Eighth Amendment claim, and (3) meet the additional requirement of a "significant injury".

The importation of Fourth Amendment standards into the Eighth Amendment realm is fundamentally at odds with existing

precedent. In Graham v. Connor, this court emphasized that Fourth Amendment and Eighth Amendment claims are judged by different standards. It held:

> In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct. The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized "excessive force" standard.

490 U.S. at 394 (emphasis added; citations and footnote omitted). This Court also shed light on the essential difference between Fourth Amendment and Eighth Amendment claims. While subjective intent is irrelevant in Fourth

Amendment cases, it is determinative in cases brought under the Eighth Amendment. The Court stated in Graham with respect to the Fourth Amendment that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." Id. at 397 (citations omitted). By way of contrast, the Court discussed the standards developed in Whitley v. Albers governing excessive force claims brought under the Eighth Amendment: "[W]hen prison officials use physical force against an inmate to restore order in the face of a prison disturbance, the question whether the measure taken inflicted unnecessary and wanton pain ultimately turns on whether the force was applied in a good faith effort to maintain or restore

discipline or maliciously and sadistically for the very purpose of causing harm." Graham, 490 U.S. at 398-99 n.11 (emphasis added; citations, internal quotations and ellipses omitted).

Graham unambiguously confirms that while Fourth Amendment analysis is governed by the "objective reasonableness" standard, claims under the Eighth Amendment are to be evaluated by looking at the subjective mental state of the prison officer. Id. at 399. In Huguet, the Fifth Circuit was purportedly "[g]uided by [this Court's] decision in Graham v. Connor[.]" 900 F.2d at 839. Yet, Huguet simply ignores the admonition in Graham that the analytical standards relevant to these two amendments are distinct, and inexplicably engrafts the two tests together for application to Eighth Amendment claims, thus accomplishing the very "generic"

treatment of excessive force claims that this Court specifically rejected. Graham, 490 U.S. at 393. In the words of Justice Cardozo, "[w]hen things are called by the same name, it is easy for the mind to slide into an assumption that the verbal identity is accompanied in all its sequences by identity of meaning." Lowden v. Northwestern National Bank, 298 U.S. 160, 165 (1936). This Court's decision in Graham makes clear that the "assumption" of the Huquet panel -- i.e., that excessive force claims, irrespective of their different constitutional underpinnings, may all be treated the same -- was in error.

B. The Fifth Circuit's Standard Is Inconsistent With This Court's Eighth Amendment Decisions

Convicted criminals surrender many of their civil rights at the jailhouse door. They are compelled by state law to submit themselves to whatever treatment

the state and its employees provide, protected only by the requirement that they not be subjected to "cruel and unusual punishment." U.S. Const., amend. VIII. This Court has held that the Eighth Amendment prohibits conduct which involves "the unnecessary and wanton infliction of pain." Wilson v. Seiter, ___ U.S. ___, 59 U.S.L.W. 4671 (June 17, 1991); Whitley v. Albers, 475 at 319; Ingraham v. Wright, 430 U.S. 651, 670 (1977): Estelle v. Gamble, 429 U.S. 97, 102-03 (1976) (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). It prohibits conduct that is "incompatible with the evolving standards of decency that mark the progress of a maturing society." Estelle, 429 U.S. at 102, quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). And, the Eighth Amendment prohibits punishment

that has no "legitimate penological justification." Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (citations omitted). By any of these measures, the right of an inmate to be free from cruel and unusual punishment is violated when he is placed in restraints and then maliciously beaten by corrections officers, as was petitioner in the case at bar. Whether the victim has suffered physical injuries that a court can characterize as "significant" (or "severe" for that matter) is, at most, but one of several relevant considerations for purposes of the Eighth Amendment.

1. Whether Conduct Constitutes An "Unnecessary And Wanton Infliction Of Pain" Does Not Depend On The Extent Of The Injury

This Court has repeatedly held that the "unnecessary and wanton infliction of pain" constitutes cruel and unusual punishment. See cases cited supra. In

order to determine whether a use of force constitutes the unnecessary and wanton infliction of pain, the proper focus is on the mental state of the party responsible for the use of force. Whitley, 475 U.S. at 321. In Wilson v. Seiter, this court recently reaffirmed that its Eighth Amendment jurisprudence "mandate[s] inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." 59 U.S.L.W. at 4672 (footnote omitted). Lower courts have been instructed to consider various factors in order to distinguish cases where corrections officers could have thought that the use of force was necessary, from those cases where their conduct amounted to a "knowing willingness that [harm] occur." Whitley, 475 U.S. at 321. These factors include "'such factors as the need for

the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted[.]'" Id. (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.) (Friendly, J.), cert. denied, 414 U.S. 1033 (1973)). Far from holding that any one factor is an absolute requirement for a finding of unnecessary and wanton infliction of pain, this Court has directed lower courts to consider all of these factors as an aid in making the "ultimate determination" regarding the prison official's state of mind. Id. Indeed, as a panel of the Court of Appeals for the Fourth Circuit stated recently, while extent of injury may be an important factor in excessive force cases, "that factor only comes into play when the nature of the force must be balanced against the proffered justification for

its application." Gray v. Spillman, 925 F.2d 90, 93 (4th Cir. 1991).

The Fifth Circuit's independent "significant injury" requirement finds no support in the decisions of this Court and has been repeatedly disavowed by other circuits.[1/] Such a requirement

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1/ See, e.g., Corselli v. Coughlin, 842 F.2d 23, 26 (2d Cir. 1988) ("Even if the injuries suffered were not permanent or severe, a plaintiff may still recover if the force used was unreasonable and excessive.") (Citations and internal quotations omitted.)); Gray v. Spillman, 925 F.2d at 91, 94 (serious injury is not an essential element of a § 1983 action when the claim is predicated on being beaten and threatened during custodial interrogation); McHenry v. Chadwick, 896 F.2d 184, 187 (6th Cir. 1990) ("[I]n this Circuit, a prisoner alleging an eighth amendment violation need not prove that he suffered a serious physical injury, rather he must demonstrate that the infliction of pain was unnecessary and wanton."); Lewis v. Lane, 816 F.2d 1165, 1171 (7th Cir. 1987) (Regular banging on bars by guards merely to harass inmates makes out a claim for constitutional

(Footnote continues on following page)

has the prospect of lending the imprimatur of the Eighth Amendment to intentional and possibly even systematic brutality on the part of corrections officers against prisoners. Repeated non-severe beatings, use of electric

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(Footnote continued from previous page)

violation.); Burton v. Livingston, 791 F.2d 97, 100 (8th Cir. 1986) ("[T]he day has passed when an inmate must show a court the scars of torture in order to make out a complaint under § 1983."); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.) (discussed infra); Sampley v. Ruettgers, 704 F.2d 491, 495 (10th Cir. 1983) (The "unnecessary and wanton infliction of pain" imposes the following three requirements: "First, 'wanton' requires that the guard have intended to harm the inmate. Second, 'unnecessary' requires the force used to have been more than appeared reasonably necessary at the time of the use of force to maintain or restore discipline. Third, 'pain' means more than momentary discomfort; the attack must have resulted in either severe pain or a lasting injury." (Footnote omitted.)); Brown v. Hughes, 894 F.2d 1533, 1538 (11th Cir. 1990) ("Deliberately inflicted pain, as with an electric cattle prod, does not become unimportant and unactionable under the eighth amendment simply because the pain produced is only momentary.").

prods, chemical agents, threats with weapons, and other forms of abuse could be free from constitutional scrutiny, so long as no serious physical trauma or lasting physical injury resulted.

The notion that a particular degree of injury, viewed in isolation, is the linchpin of a viable Eighth Amendment claim has long been rejected. In Robinson v. California, 370 U.S. 660 (1962), this Court held that a statute making it a crime to be addicted to narcotics violated the prohibition against cruel and unusual punishment. It specifically addressed the issue of how to consider the effect of the punishment on the claimant, stating:

> To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be viewed in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

Id. at 667 (emphasis added). Justice Douglas, in concurrence, added that a prosecution and conviction for addiction is cruel and unusual punishment because of the "resulting stigma and irreparable damage to the good name of the accused." Id. at 676-77 (Douglas, J., concurring).

In Furman v. Georgia, 408 U.S. 238 (1972), Justice Brennan discussed further the quantum of injury necessary for an Eighth Amendment claim:

> Pain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering. Yet the Framers also knew that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. Even though there may be involved no physical mistreatment, no primitive torture, severe mental pain may be inherent in the infliction of a particular punishment.

Id. at 271 (Brennan, J., concurring) (emphasis added; citations, footnotes and internal quotations omitted).

In Trop v. Dulles, 356 U.S. 86 (1958), this Court invalidated a punishment that did not involve even the possibility of significant physical injury. The court held that "use of denationalization as a punishment is barred by the Eighth Amendment[,]" despite the fact that "[t]here may be involved no physical mistreatment, no primitive torture." Id. at 101. The Court held that this punishment "subjects the individual to a fate of ever-increasing fear and distress." Id. at 102. Indeed, the court in Trop v. Dulles did not require proof of adverse consequences. Rather, merely "the threat" of such consequences made the punishment unconstitutional. Id.

As early as 1910, this Court invalidated a punishment without requiring a showing of "significant

injury." In Weems v. United States, 217 U.S. 349 (1910), this Court held that a sentence of cadena temporal for making a false entry in a public document violated the Eighth Amendment. There were allegations that the plaintiff in error would be forced to suffer the chaining of his appendages, but allegations of significant physical injury were clearly absent.

Each of these cases establishes that there has never been a constitutional requirement of a particular degree of physical injury for any Eighth Amendment claim. Indeed, as recently as a few weeks ago in Wilson v. Seiter, this Court implicitly rejected the suggestion that there is some required minimum threshold of physical injury when it rejected the respondents' argument that the Eighth Amendment requires a higher level of culpability in cases which do not involve

allegations of physical injury. See Wilson, 59 U.S.L.W. at 4673.

In other contexts as well, this Court has refused to impose a requirement of actual injury in order to vindicate a claim that constitutional rights have been violated. See Carey v. Piphus, 435 U.S. 247, 266-67 (1978) (given constitutional violation, proof of actual injury not required for due process claim to be actionable under § 1983; nominal damages can be awarded); Memphis Community School Dist. v. Stachura, 477 U.S. 299, 308 n.11 (1986) (an award of nominal damages under § 1983 is the appropriate way to vindicate constitutional rights where deprivation thereof has not caused actual injury). Indeed, this Court has expressly held that compensatory damages may be awarded under Section 1983, even in the absence

of physical injury. See Stachura, 477 U.S. at 307 (compensatory damages under § 1983 may be based on injuries such as "personal humiliation, and mental anguish and suffering").

Moreover, the idea that a particular level of injury is a separate and requisite element of an Eighth Amendment claim runs counter to this Court's endorsement of the balancing test articulated by the Second Circuit in Johnson v. Glick, a case cited with approval by this Court on more than one occasion. See Wilson, 59 U.S.L.W. at 4672; Whitley, 475 U.S. at 320-21. Johnson v. Glick and Whitley teach that one factor from which the mental state of a prison officer can be inferred is the amount of harm inflicted. The Fifth Circuit's "significant injury" requirement, when applied as an absolute threshold standard, effectively

disembowels the balancing approach established in Johnson v. Glick and embraced by this Court in Whitley.

To be sure, some use of force by corrections officers is permissible. As Judge Friendly noted in Johnson v. Glick, the role of the corrections officer is inherently coercive, and the observation that "[n]ot every push or shove" by a corrections officer rises to the level of a constitutional violation remains unassailable. 481 F.2d at 1033. However, as Judge Friendly recognized and this Court has held, when force which would otherwise be proper is imposed "maliciously and sadistically" it amounts to the cruel and unusual punishment which the Eighth Amendment proscribes. Whitley, 475 U.S. at 320-21.

As this Court made clear in Estelle, the line dividing ordinary torts from constitutional violation is not drawn

along the axis of injury; rather, it is the intent of the actor charged with the constitutional wrong which is determinative:

> In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

429 U.S. at 106.

The analysis is the same in excessive force cases. According to Wilson, "[t]he infliction of punishment is a deliberate act intended to chastise or deter." 59 U.S.L.W. at 4672 (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) (Posner, J.), cert. denied, 479 U.S. 816 (1986) (emphasis added)). The essential distinction between Eighth Amendment claims and ordinary torts is the intent of the prison guard. "[I]f [a] guard accidentally stepped on [a]

prisoner's toe and broke it, this would not be punishment . . . ." Id. Clearly implicit is the converse principle -- i.e., that if a guard intentionally and maliciously stomped on a prisoner's toe, intending to crush it, his conduct would violate the Eighth Amendment. Under this Court's analytical standards, whether the prisoner's toe was, in fact, broken as a result of the guard's action would be of no independent constitutional consequence.

2. Whether There Is A "Legitimate Penological Justification" For Conduct Does Not Depend On The Extent Of The Injury

This Court has included among prohibited punishments those that are "totally without penological justification." Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (citing Gregg v. Georgia 428 U.S. 153, 183 (1976) (plurality opinion)); Weems v. United States, 217 U.S. 349 (1910). Describing

the Estelle decision, Justice Powell, writing for the court in Rhodes, stated:

> In Estelle v. Gamble, . . . we held that the denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose.

452 U.S. at 347 (citation omitted).

Two seminal decisions by the Court of Appeals have concluded that the beating of inmates serves no legitimate penological purpose. In Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 23 (2d Cir. 1971), the court recognized that "[c]orporal punishment of prisoners has been disapproved of by penologists except where necessary to protect one's self or others from injury, or to prevent escape, or serious injury to property." (Citations and internal quotations omitted.)

Justice (then Judge) Blackmun, writing for the Court of Appeals for the Eighth Circuit, held that the use of the strap on prisoners is punishment that is cruel and unusual. He wrote:

> Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and to the punished alike. It frustrates correctional and rehabilitative goals. This record cries out with testimony to this effect from the expert penologists, from the inmates and from their keepers.

Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968).

Indeed, in Hutto v. Finney, 437 U.S. 678 (1978), this Court's opinion cited beatings of prisoners as a clear example of unconstitutional punishment. Id. at 682 n.4 (lashing of prisoners with leather strap). What was said with respect to whipping with the strap is equally true of a beating administered with fists and booted feet. When an

inmate's hands are shackled to his waist, he is unable to raise his hands to protect himself. When his feet are shackled together, he is hobbled and cannot easily escape. No legitimate penological purpose is served by beating an inmate who has been rendered helpless and defenseless. That conclusion does not depend on the extent of the resulting injury.

3. Whether Conduct Is "Incompatible With The Evolving Standards Of Decency" Does Not Depend On The Extent Of The Injury

The Eighth Amendment prohibits punishment that "[is] incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" Estelle v. Gamble, 429 U.S. 97, 102 (1976) (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)). To determine contemporary standards of decency, the

Court in Estelle looked to modern legislation. Id. at 103 n.8.

The Model Sentencing and Corrections Act requires the director of corrections to "adopt rules limiting the use of physical force by employees to those situations in which physical force is believed to be reasonably necessary to protect the safety of the public or security or safety within a facility." Model Sentencing and Corrections Act (U.L.A.) § 4-104(b)(2). See also American Correctional Association, Standards for Adult Local Detention Facilities, § 2-5198 (2d ed. 1987).

These standards reflect a general societal consensus that the unnecessary use of force by prison guards is incompatible with modern standards of decency. Certainly, the beating of a prisoner who is in full restraints offends common sense notions of decency.

The suggestion that society's views with regard to such conduct would vary depending on the severity of the injury suffered by the prisoner as a result of such a beating defies logic and experience.

II. AS A MATTER OF POLICY, THE FIFTH CIRCUIT STANDARD FAILS TO SERVE ITS INTENDED PURPOSES

The Fifth Circuit's adoption, in Huquet, of an all-inclusive four-element threshold test against which to measure the sufficiency of prisoners' Eighth Amendment excessive force claims is only the most recent manifestation of that court's campaign to facilitate prompt dismissal of broad categories of pro se complaints it deems unmeritorious. Under Huquet, the Fifth Circuit intends that any excessive force claim that is determined, at the outset, to be deficient in its allegations as to any of the four Huquet elements -- including

"significant injury" -- will be deemed "frivolous" and dismissed forthwith under Section 1915(d). See Huquet v. Barnett, 900 F.2d at 841-42; see also Wesson v. Oglesby, 910 F.2d 278, 282-83 (5th Cir. 1990) (affirming dismissal, pursuant to Section 1915(d), of excessive force claim as having "no arguable merit" due to failure of prisoners' allegations to satisfy Huquet standards).[2/]

2/ 28 U.S.C. § 1915 permits a private litigant to commence an action in federal court in forma pauperis ("IFP"), if he is unable to afford the costs of litigation, as demonstrated by affidavit. However, Section 1915(d) expressly provides that "[t]he court may . . . dismiss the case if the allegation of poverty is untrue, or if satisfied that the case is frivolous or malicious." (Emphasis added.) Under the procedure employed in the Fifth Circuit, if a federal magistrate, after a hearing, determines that the pro se indigent prisoner's Section 1983 claim is "frivolous or malicious", the Magistrate may recommend revocation of IFP status and dismissal of the complaint. See Green v. McKaskle, 788 F.2d 1116, 1119 (5th Cir. 1986); Spears v. McCotter, 766 F.2d 179, 182 (5th Cir. 1985).

Recent decisions of this Court expressly approve the judicious use of some mechanisms by which federal district courts can deal with the burdens on their caseloads resulting from pro se filings. See, e.g., McCarthy v. Bronson, ___ U.S. ___, 111 S. Ct. 1737, 1741-42 (1991) (endorsing district courts' referral to magistrates under, 28 U.S.C. § 636(b)(1)(B), of prisoners' Section 1983 "conditions of confinement" claims); Neitzke v. Williams, 490 U.S. 319 (1989) (approving summary dismissal of certain types of in forma pauperis actions pursuant to Section 1915(d) "to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits"). What this Court has not approved, however, is the adoption and imposition of novel substantive legal standards as a device to facilitate dismissal of pro se claims at a threshold

stage, based upon their characterization as "frivolous". Yet, that is precisely the path upon which the Fifth Circuit has embarked.

In Neitzke, Justice Marshall, writing on behalf of a unanimous Court, stated that:

> [A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact. As the Courts of Appeals have recognized, § 1915(d)'s term "frivolous," . . . embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.

490 U.S. at 325-26 (emphasis added; footnote omitted). The requirement that an Eighth Amendment excessive force claimant must allege, and show the ability at the outset of litigation to prove, "significant injury" in order to be entitled to his day in court is hardly the type of "inarguable legal conclusion" contemplated by this Court. As shown

hereinabove -- see supra at 23 n.1 -- many courts flatly reject that view. To categorically define claims failing to meet the "significant injury" standard as "frivolous", as does the Fifth Circuit, "is to distort measurably the meaning of frivolousness both in common and legal parlance." Id. at 328-29.

Accordingly, even assuming the general propriety of efforts to summarily dispose of truly unmeritorious pro se prisoners' complaints, it is nevertheless clear that this Court has never suggested that substantive legal elements may be interposed in such a way as to prevent most cases from reaching even the first stages of truly adversarial proceedings. See Neitzke, 490 U.S. at 329-30 (plaintiffs with "arguable claim[s]" are entitled to the procedural protections attendant to Rule 12(b)(6) motions practice, which are absent from the "sua

sponte dismissals permitted by and frequently employed under § 1915(d)"). This critical conceptual flaw in the Fifth Circuit's newest device for exercising control over its courts' pro se docket is only compounded by the considerable problems of practical application revealed by that court's short-lived experience with implementation of the "significant injury" standard.

Even cursory analysis of the recent cases in which the Fifth Circuit has attempted to apply the "significant injury" standard reveals the myriad problems its employment presents. One such problem is the court's apparent difficulty in defining what the applicable standard actually is. Illustrative of this difficulty are the decisions in Adams v. Hansen, 906 F.2d 192 (5th Cir. 1990), Wesson v. Oglesby,

910 F.2d 278 (5th Cir. 1990), and Oliver v. Collins, 914 F.2d 56 (5th Cir. 1990). In Adams, the court reviewed dismissal of an Eighth Amendment excessive force claim, based on the district judge's finding that the claimant had not suffered any "severe" injury.[3/] 906 F.2d at 193. The Court considered whether the "severe injury" standard applied by the district court was the functional equivalent of the "significant

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3/ This district court decision was rendered prior to the Fifth Circuit's adoption of a mandatory "significant injury" requirement in Huquet, supra, and the "severe" injury standard was taken from Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981), a police brutality case arising under the Fourteenth Amendment. The Shillingford decision did not define the term "severe" for these purposes, and it certainly did not suggest that the presence or absence of "severe injury", taken alone, would be dispositive as to whether a Section 1983 claim should be dismissed or permitted to proceed to full litigation on the merits. See Johnson v. Morel, 843 F.2d at 848-49 (Thornberry, J., dissenting).

injury" standard imposed by the intervening decision in Huquet, and held that the two standards were the same. Id. at 194. However, in the Wesson case, decided less than two months later by a different panel, the court, also addressing a district court's dismissal of an Eighth Amendment claim based on a pre-Huquet "severe injury" analysis, implied that the two standards were not the same. See 910 F.2d at 283 n.4 (referring to "severe injury" standard as "at least as demanding as the Huquet 'significant injury' standard"). A mere two weeks later, the same panel that decided Wesson again confronted the "severe"/"significant" dichotomy in Oliver v. Collins, and reached yet another conclusion. See 914 F.2d at 59 ("[G]iven the history of . . . Huquet, we must regard 'significant' as different from, and imposing in at least some

respects a less stringent standard than, 'severe.'"); see also id. at 59 n.1 (characterizing the court's statement in Adams v. Hansen to effect that "severe injury" and "significant injury" are the same (which the Court in Adams had described as its holding) as "essentially dicta").

The court's uncertainty as to what the applicable standard is, is compounded by its apparent inability to determine what the standard means, in application. While Huquet unequivocally represents "significant injury" as an objective standard, see 900 F.2d at 841, subsequent Fifth Circuit decisions reveal the court to be utterly incapable of applying it in that way. The court's judges do not even purport to be able to articulate the standard's meaning in an objective fashion. See, e.g., Wesson, 910 F.2d at 283 ("What quantum of harm constitutes 'significant injury' under the eighth

amendment? We need not embark on this nebulous inquiry . . . .").

Instead, the court has sought guidance in Johnson v. Morel, the Fourth Amendment case from which the Huquet "significant injury" standard was derived. The alleged injuries in Johnson, which were found sufficiently "significant" by the en banc court to require reversal of a summary judgment against the claimant, are now used as a baseline standard for purposes of Eighth Amendment scrutiny. See, e.g., Adams v. Hansen:

> The "significant injury" factor is taken directly from Johnson v. Morel, 876 F.2d at 479-80; and we look to that opinion for guidance. The actionable injury in Johnson was: "Morel applied the handcuffs so tightly that they not only broke the skin, but left apparently permanent scars on Johnson's wrists . . . ." 876 F.2d at 478. In light of Johnson, as adopted by Huquet, Adams's injuries -- lacerated fingers

> requiring sutures -- are of sufficient magnitude to invoke Eighth Amendment protection.

906 F.2d at 193-94 (footnote omitted); see also Williams v. Luna, 909 F.2d 121, 124 (5th Cir. 1990) (by comparison to Johnson injuries, plaintiff's allegations of "headaches, back pain, and muscle control problems in both legs" resulting from unprovoked beating by prison guards met "significant injury" standard); Oliver v. Collins, 914 F.2d at 59-60 & n.1 (allegations of headaches, backache and irregular heartbeat due to beating by prison guards sufficient to meet Johnson/ Huquet standard). Yet even in this context, the court has been inconsistent in its analytical approach. In a short one-paragraph decision affirming dismissal in Wise v. Carlson, 902 F.2d 417 (5th Cir. 1990) (per curiam), the Court concluded that the plaintiff's allegations of "bruises on [his] anterior

chest wall and right forearm and a hematoma on the right upper eyelid" did not amount to "significant injury", without mention of or comparison to the injuries in Johnson. Similarly, relying on Wise, the court below rejected petitioner Hudson's claims with only passing reference to Johnson, and no comparative analysis.

Finally, the Fifth Circuit has proved itself unable to employ a coherent approach to implementation of "significant injury" analysis. In Huquet, the court stated that the "significant injury" component "[is] to be examined objectively, focusing solely on the injury[.]" 900 F.2d at 841 (emphasis added). The court's treatment of the issue in the decision below, in Wesson v. Oglesby, 910 F.2d at 283, and in Wise v. Carlson, 902 F.2d at 417-18, appears to reflect faithful adherence to

that approach. In stark contrast is the most recent decision on these matters, Oliver v. Collins, wherein the court stated:

> There must in all these cases be a "significant injury." Huquet. But where there is a plausible claim that there was no provocation, and no force or other actions whatever were even apparently called for, and the guards' action was not at all in connection with attempting to carry out any arguable employment function but was rather wholly vindictive and punitive from the inception, then our precedents do not foreclose considering these circumstances in determining whether the resultant injury is "significant."

914 F.2d at 59 (emphasis added; citation omitted).

The foregoing analysis is not intended to criticize the Fifth Circuit, so much as to highlight the virtually inevitable consequences of that court's attempt to accomplish an impossible task. What level of injury will be found to merit the characterization

"significant", for purposes of implementation of the "significant injury" standard, is an inherently comparative, and hence subjective, determination.[4/]

It can hardly be regarded as a coincidence that of the five reported Eighth Amendment excessive force decisions issued by the court since Huquet, three have been reversed specifically on the grounds that the

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4/ That which is "objective" has been defined as "independent of what is personal or private in our apprehension and feelings; of such nature that rational minds agree in holding it real or true or valid." Webster's Third New International Dictionary 1555-56 (Merriam-Webster 1981). It is facially untenable to suggest that all, or even most, "rational minds" would agree that the bruised face, split lip, and broken dental plate suffered by petitioner as a result of his beating by respondents do not constitute "significant" injuries. This simple observation is sufficient in itself to undermine the Fifth Circuit's proposition that a "significant injury" standard is susceptible to application on an "objective" basis.

appellate panel unanimously disagreed with the district court's determination that the respective prisoners' alleged injuries were not "significant" for Eighth Amendment purposes. See Oliver v. Collins, 914 F.2d at 60; Williams v. Luna, 909 F.2d at 124; Adams v. Hansen, 902 F.2d at 193-94. Such disagreements between equally intelligent, fair-minded and conscientious jurists, with regard to an issue such as this, can properly be regarded as a foregone conclusion.

For this very reason, the Fifth Circuit's attempts to employ the "significant injury" standard as a substantive device facilitating early dismissal of large numbers of pro se prisoners' excess force complaints -- even assuming that were a permissible objective -- is doomed to fail. Such a standard merely changes the battleground; it cannot win the war. Thus, as Justice

Stevens cogently observed, albeit in a different context:

> Admittedly, it is tempting to eliminate the meritless complaint at the pleading stage. Unfortunately, this "is another instance of judicial haste which in the long run makes waste."

Estelle v. Gamble, 429 U.S. at 113 (Stevens, J., dissenting) (quoting Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (Clark, J.)). There will be no fewer pro se filings made, and no fewer appeals taken, as a result of adoption of the "significant injury" standard.[5/] The inability of that standard, in practical application, to

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5/ See also Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 512-14 & nn.13,18 (1982) (Marshall, J., for the majority) (declining to impose exhaustion of state remedies obligation as prerequisite to institution of Section 1983 claim in light of concerns that exhaustion procedure "would bog down the courts in massive procedural litigation thereby frustrating the purpose of relieving the caseloads of the federal courts").

serve the objectives for which it was developed, is further reason for its rejection by this Court.

CONCLUSION

for all of the foregoing reasons, as well as for the reasons stated in the Opening Brief of Petitioner, this Court should reverse the judgment entered by the court below and reinstate the district court judgment and award of damages in favor of petitioner.

Respectfully submitted,

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No. 90-6531

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

KEITH HUDSON,

Petitioner,

v.

JACK MCMILLIAN, MARVIN WOODS, AND ARTHUR MEZO,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

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QUESTION PRESENTED

Did the Fifth Circuit apply the correct legal test when determining that petitioner's claim that his eighth amendment rights under the cruel and unusual punishment clause were not violated as a result of a single incident use of force by the respondents which did not cause a significant injury?

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No. 90-6531

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Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF *AMICI CURIAE* FOR THE STATES OF TEXAS, HAWAII, NEVADA, AND WYOMING

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COME the States of Texas, Hawaii, Nevada, and Wyoming, *Amici Curiae* herein, and file this brief.

INTEREST OF THE *AMICI CURIAE*

The *amici* states have the responsibility for managing prison populations of convicted felons. The various attorneys general provide legal representation to correctional officials who are sued by prison inmates for violation of their civil rights under the Constitution. The particular legal standard at issue in this case arose out of an incident occurring in a Texas prison. *See Huguet v. Barnett*, 900 F.2d 838 (5th Cir. 1990). The *amici* states submit their brief *amici curiae* in support of respondents and ask this Court to affirm the holding of the court of appeals.

SUMMARY OF ARGUMENT

When a prisoner brings a claim for an excessive use of force by a correctional officer, the eighth amendment provides the substantive source of protection. An eighth amendment claim has two separate and distinct inquiries it must answer: whether there is a sufficiently serious deprivation and whether there is a sufficiently culpable state of mind on the part of the government official. The Fifth Circuit's test in *Huguet v. Barnett*, 900 F.2d 838 (5th Cir. 1990) aptly requires both inquiries. The threshold inquiry of whether there was a serious deprivation is a separate and distinct test from the ultimate inquiry of whether there was an unnecessary and wanton infliction of pain. A plaintiff must overcome the threshold requirement before addressing the ultimate state of mind inquiry.

The eighth amendment protects convicted felons only against cruel and unusual punishments. To remove the significant injury requirement of the Fifth Circuit test for a single incident use of force would expand the scope of coverage of the eighth amendment

to raise ordinary common law torts to the level of a constitutional violation. Every use of force in prison would be actionable under 42 U.S.C. § 1983, regardless of the amount of harm caused.

The significant injury element of the Fifth Circuit test is part of the eighth amendment's threshold test which requires objectively significant harm. The test is specifically designed to address the type of case here at issue: a spontaneous single incident use of force by a state correctional officer on an inmate. Based on *Estelle v. Gamble*, 429 U.S. 102 (1976), and its requirement of a serious illness or serious medical need in an eighth amendment medical claim, a claim of an excessive use of force should similarly require a significant deprivation.

In this case, the court of appeals properly dismissed petitioner's claim because the trial court found petitioner's injuries to be minor and therefore not significant. Petitioner admits that *de minimis* injury does not state a claim under the eighth amendment, but would have this court find that his minor injuries were significant as a matter of law. The court of appeals, based on the trial court's finding, properly determined that the harm to petitioner was not sufficiently serious to constitute cruel and unusual punishment under the eighth amendment.

ARGUMENT

This case presents the question whether a convicted prisoner must show a constitutionally significant injury when claiming that his eighth amendment rights under the cruel and unusual punishments clause were violated by a single incident use of force by a prison guard. Petitioner, Keith J. Hudson, alleges that the respondent correctional

officers used excessive force on him during an incident at Camp J of the Louisiana State Penitentiary in Angola, Louisiana, on October 30, 1983. The eighth amendment provides the substantive source of constitutional protection for convicted prisoners in the prison security context. *Graham v. Conner*, ___ U.S. ___, 109 S. Ct. 1865, 1870-71 (1989) (in analyzing a claim of physically intrusive governmental conduct, the courts must look to the "explicit textual source of constitutional protection."). When the deliberate use of force is challenged as excessive and unjustified, "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Whitley v. Albers*, 475 U.S. 312, 106 S. Ct. 1078, 1085 (1986), *citing Johnson v. Glick*, 481 F.2d 1028 (2nd Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973).

A valid eighth amendment claim depends upon bifurcated components: a sufficiently serious deprivation and a sufficiently culpable state of mind on the part of state officials. *Wilson v. Seiter*, 111 S. Ct. 2321, 2324 (1991), *citing to Whitley, supra and Rhodes v. Chapman*, 452 U.S. 337 (1981). The threshold test of an eighth amendment claim is the first, objective component. *Wilson*, 111 S. Ct. at 2326. The Fifth Circuit legal standard under scrutiny, which requires that each element of the standard be separately proven, begins with this component:

1. [A] significant injury, which
2. resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was
3. objectively unreasonable, and

4. the action constituted an unnecessary and wanton infliction of pain.

Huguet v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990).

Thus, unless a plaintiff establishes that he has sustained a constitutionally significant injury, he fails to state a claim under the eighth amendment. The Fifth Circuit directs that the first three elements must be examined separately and objectively. It is only after a plaintiff proves the first three elements that the court will examine the fourth, subjective element. *Id.* This standard is entirely consonant with the Supreme Court's most recent explanation of eighth amendment requirements, *Wilson*, *supra*, and with the history of the eighth amendment in the Supreme Court.

I. TO REMOVE THE REQUIREMENT OF A CONSTITUTIONALLY SIGNIFICANT INJURY FROM THE LEGAL STANDARD FOR AN EXCESSIVE USE OF FORCE CLAIM WOULD EXPAND THE COVERAGE OF THE EIGHTH AMENDMENT.

The eighth amendment simply mandates that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. While these words first appeared in the English Bill of Rights of 1689,[1] by the time the framers met to consider the United States Constitution and throughout the eighteenth and nineteenth centuries, the phrase "cruel and unusual

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[1] Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969).

punishments" was interpreted to prohibit "tortures" and "barbarous" punishments.[2]

A. The First Expansions Of Eighth Amendment Coverage Focused On The Sentence And The Criminal Act.

The Supreme Court did not expand its view of the cruel and unusual punishments clause until the early twentieth century in *Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544 (1910), where the court found that the sentence imposed on a particular prisoner was grossly disproportionate to the crime committed.[3] *See also Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590 (1958) (sentence of denationalization held to be cruel and unusual because statelessness effectively deprives a

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[2] *Id.*, at 842; *see also Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 290 (1976).

[3] In *Weems*, an official was convicted of falsification of an official document and was sentenced to 15 years at hard labor. The official had falsified a single item of a public account. The statute under which the official was convicted contained no intent requirement and no variations in the sentencing structure, so the official was held strictly liable. The Supreme Court, in holding that the length and severity of the sentence were cruel and unusual punishment, stated:

> The highest punishment possible for a crime which may cause the loss of many thousands of dollars, and to prevent which the duty of the state should be as eager to prevent the perversion of the truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account. And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual.

Weems, 30 S. Ct. at 554.

person of all rights -- "total destruction of the individual's status in organized society.") In *Trop*, the court acknowledged that the eighth amendment protects against more than physical mistreatment and physical torture -- "the amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. The basis for the holding in *Trop* did not directly rest upon the proportionality concept of *Weems*, but upon the fact that the punishment of denationalization for any crime was so egregious that it did not fit into a civilized concept of modern society.[4]

The court next focused on a "crime" for which any punishment would be cruel and unusual in *Robinson v. California*, 370 U.S. 661 (1962). The petitioner in *Robinson* had been convicted for the crime of being a drug addict. The court compared criminalizing the status of being a drug addict to criminalizing the status of having the common cold. While neither status may be desirable, criminalizing a status having nothing to do with a volitional act was found to be an infliction of cruel and unusual punishment.

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[4] While the concept of proportionality was not the basis of the holding, it must have at least influenced the court. The particular crime at issue was the escape of a soldier from an Army stockade and the soldier's desertion for one day in 1944. The military court sentenced the soldier to three years at hard labor, forfeiture of all pay, and a dishonorable discharge. Under a separate federal statute, he lost his citizenship because of his dishonorable discharge and conviction for wartime desertion.

B. The Second Major Expansion Of Eighth Amendment Coverage Included Conditions Of Confinement Outside The Specific Sentence.

Conditions of confinement fall within the scope of the cruel and unusual punishments clause because the government has the obligation to provide to those it punishes by incarceration at least the minimal civilized measure of life's necessities. For instance, deliberate indifference to an inmate's serious medical needs in the worst case scenario may result in "torture or a lingering death," and "in less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose." *Estelle v. Gamble*, 429 U.S. 102, 103 (1976). There has never been any question, however, that anything less than a serious deprivation fails to rise to the level of a violation of the cruel and unusual punishments clause. The court in *Rhodes v. Chapman*, 452 U.S. 311, 347 (1981) explained that conditions of confinement may constitutionally be "restrictive and even harsh" because "they are part of the penalty that criminal offenders pay for their offenses against society." The constitutional limitation is that the conditions may not be cruel and unusual. Anything less should be dealt with under state law, as contemplated by *Estelle*.

The Supreme Court in *Estelle* extended the eighth amendment's protection from cruel and unusual punishments to an inmate's serious medical needs. A valid medical claim under the eighth amendment requires a "serious illness or injury" and allegations that an official's acts or omissions were sufficiently harmful to evidence deliberate indifference to serious medical needs. *Estelle*, 429 U.S. at 105-106. *Estelle* specifically precluded extending eighth amendment

coverage to claims of medical malpractice where the physician has been simply negligent in diagnosing or treating a medical condition. An inmate in that case has the remedy of bringing a common law action for medical malpractice, just like an ordinary citizen. An eighth amendment prison conditions case simply requires more than a common law tort.

C. The Present Threshold Requirement.

The threshold test of an eighth amendment claim turns on whether an inmate has suffered an objectively serious deprivation. *Wilson*, 111 S. Ct. at 2324. If there were no such requirement, an inmate could proceed with an eighth amendment claim on the mere theory that a use of force inflicted minimal physical or mental pain. *Id.*; *Rhodes*, 452 U.S. at 348-49. In the context of *all* eighth amendment claims, petitioner may be correct in stating that actual physical injury is not necessarily a prerequisite to an actionable deprivation. However, all eighth amendment claims are not at issue in this case. Here, the issue is whether a plaintiff must demonstrate a significant injury to state a viable 42 U.S.C. § 1983 claim for a single incident excessive use of force claim arising in a prison security context. Although it is not easy to imagine such a case where there is no physical injury, the Fifth Circuit has not ruled out the possibility. *See, e.g., Johnson v. Morel*, 876 F.2d 477, 480 n.1 (5th Cir. 1989) (en banc) ("We think it unlikely that such a significant injury will be caused by unnecessary force without significant *physical* injury. However, on the facts before us here, we do not decide whether a significant but non-physical injury would be legally significant.").

The states do not seek to contest petitioner's statement that significant excruciating pain may be

inflicted without leaving visible traces. For example, the deliberate administration of electric shock to sensitive areas of the body is torture, plain and simple, and, therefore, cruel and unusual punishment. But the "annals of torture and coercive interrogation"[5] occur in a significantly different context than the incident presently under scrutiny. Two characteristics of this type of prison disturbance are that the incident is almost always isolated and of a spontaneous nature. Also typically, the actors have sharply divergent stories.[6] In fact, the only objective evidence which does not depend to a large extent on any actor's version of the events is medical evidence of the extent of the inmate's injuries, if any.

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[5] *See* Petitioner's Brief at 7.

[6] Usually the inmate claims that he did nothing to provoke an attack and is baffled by the fact that the officers felt the need to use force. The officers typically are involved in escorting the inmate from one area of the prison to another. The officers' claim generally is that the inmate resists the move or is otherwise recalcitrant (although in this case the officers deny that the incident ever took place). The most common reason officers are escorting prisoners in the first place is that the inmate in question resides in administrative segregation (that portion of the prison reserved for inmates with a history of discipline problems which threaten the safety of others), and needs to be removed to some other place, such as to another cell. In this case, the petitioner lived in that portion of the Louisiana State Penitentiary reserved for its most disruptive prisoners and the use of force was incidental to removing petitioner to another cell. Transcript at 97-98.

The typical prison use of force incident also takes place in the context of the need to "preserve internal order and discipline and to maintain internal security."[7] *Huguet*, 900 F.2d at 841, *quoting Whitley*, 106 S. Ct. at 1085.

> Prisons, by definition, are places of involuntary confinement of persons who have demonstrated proclivity for anti-social criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

Hudson v. Palmer, 468 U.S. 517, 526 (1984). Thus, prison security measures must take into account this volatile community. "The management of a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force." *Johnson v. Glick*, 481 F.2d at 1033. Whether the use of force appears to have been justified, it may not be taken out of the context just described. Judge Friendly in *Johnson* reminds us that these incidents do not take place in a vacuum. *Id.* ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.").

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[7] The most recent national survey of statistics on violent crime in prisons is illustrative of the security problems prison administrations face. The following numbers are the total for the years 1989 and 1990. Number of inmates killed by inmates: 105. Number of staff killed by inmates: 4. Number of assaults on staff by inmates: 10,827. Number of assaults on inmates by inmates: 22,697. Number of inmate suicides: 221. Total number of violent deaths: 335. *See* 14 CORRECTIONS COMPENDIUM 9 (June 1991).

The Fifth Circuit's *Huguet* standard is specifically designed to analyze a single incident use of force occurring in this prison context. The first three prongs of the test address the required threshold to an eighth amendment claim -- that the inmate's deprivation be sufficiently and objectively serious. Based on *Estelle*'s requirement of a serious illness or injury, the test requires a constitutionally significant injury. Prongs two and three take into account the context of the use of force and the competing institutional concerns of the prison's security and the inmate's own concerns. Only after the three elements of the threshold test have been met does the analysis shift to the fourth, subjective element. In answering the ultimate inquiry of whether the action constituted an unnecessary and wanton infliction of pain:

> [T]he trier of fact may draw inferences from its consideration of the first three elements. It must however, accord prison officials "wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain internal security."

Huguet, 900 F.2d at 841 (internal citations omitted).[8]

Certainly this test does not afford as much protection as the common law tort action for battery. This fact is, however, appropriate because the specific textual source of constitutional protection from physically intrusive governmental conduct in a prison context is the eighth amendment's cruel and unusual punishments clause. The quantum of injury required to trigger eighth amendment protection should be drawn

[8] *Graham v. Conner*, 109 S. Ct. at 1872-73 n.11 has effectively endorsed this test.

as brightly as possible consistent with the purpose of that amendment. However this degree of injury is quantified, clearly it must involve more than mere unreasonable force involving any injury whatsoever: it must involve cruel and unusual punishment. Removing the significant injury requirement would effectively remove the barrier between the common law tort actions for assault and battery and the violation of a constitutional right under § 1983. Battery makes actionable any intentional and unpermitted contact with a plaintiff.[9] A convicted prisoner has the avenue of bringing a claim for assault or battery in the state court; he is not without a remedy if he fails to state an eighth amendment violation. *Estelle* recognized the need to draw a clear line of demarcation between a claim for medical malpractice and a claim for violation of the cruel and unusual punishments clause.[10] The *Huguet* standard is entirely consonant with *Estelle*, as the eighth amendment simply does not protect against ordinary battery, just as it does not protect against ordinary medical malpractice.

[9] *See Johnson v. Glick*, 481 F.2d at 1033 ("the least touching of another in anger is a battery").

[10] *See Baker v. McCollan*, 443 U.S. 137, 146 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.").

II. THE FIFTH CIRCUIT'S *HUGUET* TEST MEETS CONSTITUTIONAL STANDARDS FOR A SPONTANEOUS SINGLE INCIDENT USE OF FORCE IN THE PRISON CONTEXT.

A. The Practical Implications

Petitioner concedes, as he must, that he suffered only minor injuries requiring no medical attention. While no government can condone unrestrained physical confrontations by prison guards, petitioner's claim does not pass constitutional muster under the cruel and unusual punishments clause. Petitioner suggests that it would cripple the eighth amendment if such brutal conduct went unpunished simply because a prisoner did not sustain a significant injury. He also suggests that the eighth amendment is the only restraint under which a correctional officer operates with prisoners. The eighth amendment, however, was not designed to prevent prison guard misconduct. It was designed to prevent cruel and unusual punishments. To the extent a prison guard uses excessive force, causes significant injury, and applies the force maliciously and sadistically for the very purpose of causing harm, the eighth amendment does provide a remedy to the prisoner. The suggestion that the significant injury requirement would produce an "open season" upon inmates violates reality. The average prison guard does not know about any "significant injury" requirement. The average prison guard is unlikely to have a comprehensive knowledge of this or any court's development of eighth amendment

standards.[11] The average prison guard knows, like any of us, that if he unjustifiably hurts someone, he is likely to get in trouble. Additionally, many if not most of the states' prisons are subject to remedial decrees which control uses of force far more specifically than the eighth amendment ever can. The state prisons have their own written policies and procedures which also specify when and how force may be used. Correctional officers know that they may be fired or otherwise disciplined over an excessive use of force found to violate their internal regulations. This is all that can be realistically expected of them.

Practically, the standard will affect the manner in which courts process prisoner use of force claims. The significant injury requirement allows courts to dispose of allegations of inmates who claim to have been assaulted by prison guards, where there is no serious harm. Often the only objective evidence available to a trier of fact in a use of force case is evidence of physical injury. It would, in fact, cripple the eighth amendment and unreasonably burden the federal judiciary to invoke a system which provides no objective method for winnowing the wheat from the chaff. The significant injury requirement has been very effective in the Fifth Circuit in helping to control its system-wide docket management problems.[12] This

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[11] One of the respondents even testified at trial that he was not familiar with the provisions of the eighth amendment itself. Joint App. at 24.

[12] *Pro se* prisoner civil rights suits comprise a significant percentage of the federal courts' civil docket. During the twelve month period ending March 31, 1991, prisoners filed 24,905 civil rights lawsuits in the federal courts nationwide. In the Fifth Circuit, where the largest number of *pro se* prisoner civil rights petitions were filed, the number was 3,355. In Texas, the number was 1,519. STATISTICAL TABLES FOR THE TWELVE MONTH PERIOD

(Footnote continued on next page)

system allows the meritorious claims to be heard. Under the current Fifth Circuit procedure, inmates now get more trials and more cases processed to settlement because there is a mechanism in place to separate out potentially meritorious claims.[13]

The Fifth Circuit has yet to rule out the potential for a non-physical significant injury. *See Johnson v. Morel*, *supra*. Petitioner cites to the *Hutto v. Finney*, 427 U.S. 678 (1978) opinion's description of the "Tucker Telephone" as an example of how pain may be delivered without causing visible physical injury. This example is simply inapposite. The "Tucker Telephone" is a method of torture, not an example of a spontaneous single incident use of force. The courts in the Fifth Circuit have yet to examine a fact situation where a prisoner has been tortured by a prison guard without causing some sort of significant physical injury. Yet, the *Huguet* test has plainly not foreclosed the possibility that a constitutional deprivation may be shown in such a context.

(Footnote continued from previous page)
ENDED MARCH 31, 1991, Administrative Office of the United States Courts. For the preceding year, the numbers are substantially the same.

[13] In 1986, the federal courts in Texas had an enormous backlog of about 2,000 *pro se* prisoner civil rights cases, many of which had been languishing for years. Primarily through the institution of evidentiary hearings conducted by federal judges at the prison units, along with the careful refinement of constitutional standards by the Fifth Circuit, the backlog no longer exists. The typical eighth amendment use of force case now takes about one year from the time the complaint is filed to termination of the litigation, as the district courts are able to keep current with their prisoner dockets.

B. The Test Must Address The Specific Type Of Conduct Against Which A Constitutional Violation Is Alleged.

Petitioner and his *amici* cite to many different cases from the different circuits as illustrative of allegations passing constitutional muster. Many of the cited cases are inapposite, however, because they occur in the fourth amendment context of an unreasonable seizure, not the eighth amendment context of cruel and unusual punishment. It goes without saying that those two very different constitutional provisions involve significantly different constitutional protections as they address, respectively, the rights of free world citizens and the rights of convicted felons. The eighth amendment is less protective than the fourth, *see Graham*, 109 S. Ct. at 1873, and the threshold for stating an eighth amendment claim is commensurately higher.

Petitioner cites other cases out of context. He attempts to use *Rhodes* for the proposition that a prisoner need not allege the existence or severity of an injury to prove cruel and unusual punishment. Petitioner is not entirely correct. The only issue disputed and decided in *Rhodes* was "whether the conditions were a sufficiently serious deprivation to violate the constitutional standard." *Wilson*, 111 S. Ct. at 2325 n.2. The *Rhodes* Court did not decide that the conditions constituted cruel and unusual punishment and in fact found no serious deprivation. Petitioner then cites to *Whitley* to support his position that the extent of injury is only relevant to the "ultimate inquiry." Thus, he argues, *Whitley* "contemplates that if there is a complete absence of justification for the use of force, the intentional application of any force, beyond *de minimis* force, is unconstitutional. The presence or

absence of justification is the test." Petitioner's Brief at 13. *Whitley*, however, does not stand for that proposition. Injury can still be an independent factor even as it sheds light on the other elements. Just because it is relevant to other factors does not mean that it is not a controlling issue in its own right. Moreover, the issue of significant injury did not even arise in *Whitley*; the inmate there received a shotgun blast in the leg. That, unquestionably, would constitute significant injury under the Fifth Circuit's *Huguet* test.

The context of the incident of which petitioner complains must inform the issue here. This case does not concern system wide injunctive relief designed to cure the deprivation of "life's basic necessities." It is not straight out of the "annals of torture and coercive interrogation." Officers did nct slip into petitioner's cell as he lay peacefully sleeping and brutally beat him up. This is a spontaneous single incident use of force case arising out of disciplinary camp housing as correctional officers moved a disruptive inmate from one portion of the prison to another. The test for an eighth amendment claim must be tailored to the specific conduct and context. The constitutional test has two parts: a sufficiently and objectively serious deprivation and a sufficiently culpable state of mind on the part of the officials. *Wilson*, *supra*. The first part is the threshold inquiry and the second part is the ultimate inquiry. The fundamental inquiries must be adapted to the context of the particular claim at issue. The Fifth Circuit *Huguet* standard accomplishes this objective.

C. The Threshold Inquiry Of An Eighth Amendment Claim Does Not Have As Its Basis The Unnecessary And Wanton Infliction Of Pain.

As stated, before a court addresses the ultimate inquiry of whether a prison official's conduct may be characterized as wanton, a prisoner must overcome the threshold test of showing a serious deprivation. *Wilson*, 111 S. Ct. at 2326 ("*Whitley* teaches that, assuming the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim [citation omitted], whether it can be characterized as `wanton' depends on the constraints facing the *official*"). The *Wilson* court took no issue, for example, with the court of appeals' dismissal of a number of plaintiff's claims there before it reached the state-of-mind issue, on the ground that they did not demonstrate a serious deprivation. *Id.* at 2327. Clearly, then, the wantonness of conduct has no relevance to the threshold issue because the answers to the two inquiries involve separate and distinct tests. *Wilson* never rejected the "suggestion that there is some required minimum threshold of physical injury" in single incident use of force cases. *See* Petitioner's Brief at 15. A prisoner must demonstrate objectively significant harm before addressing the ultimate issue of whether the conduct was an unnecessary and wanton infliction of pain.

III. THE FACTS OF THIS CASE WARRANT AFFIRMING THE COURT OF APPEALS.

The court of appeals found the facts sufficient to support a holding that no force was required, that the force used was objectively unreasonable and clearly excessive, and that it occasioned unnecessary and

wanton infliction of pain. Joint App. at 32. But because the magistrate characterized the harm as minor and requiring no medical attention, the court of appeals held that petitioner failed the significant injury prong of the *Huguet* test. Joint App. at 32-33 ("minor harms do not rise to constitutional proportions"). We must accept the trial court's findings that the injuries were minor because the trial court is the only court with fact jurisdiction. Petitioner cannot first ask us to accept the trial court's findings on the other three elements and then ask us to disregard its holding on the issue of harm. Petitioner concedes that *de minimis* injuries do not rise to constitutional proportions. He then suggests, however, that his minor injuries are significant injuries as a matter of law. Petitioner's Brief at 6 n.3 and 25 n.22. The lower courts are fully capable and charged with the responsibility of applying the Fifth Circuit's *Huguet* test and deciding the relative gravity of the factual assertions concerning injury. Because the petitioner failed to show an objectively significant injury, he failed to pass the threshold test. This court need not disturb the holding of the court of appeals.

CONCLUSION

For the above reasons, the State of Texas urges this Court to affirm the holding of the court of appeals.

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